

PROTECTION OF FOREIGN DIRECT INVESTMENT IN PAKISTAN: IS IT TIME TO ADDRESS THE DETECTING FACTORS?

Mohammad Raheem Awan

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**PROTECTION OF FOREIGN DIRECT INVESTMENT IN PAKISTAN: IS IT
TIME TO ADDRESS THE DETERRING FACTORS?**

by

Mohammad Raheem Awan

In partial fulfilment of the requirements for the Degree of Doctor of Philosophy
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Abstract

Foreign direct investment (“FDI”) is one of the significant sources of social and economic change in developing countries. It can be used in terms of transferring capital, technology and administrative skills to the host country. The Board of Investment of Pakistan (“BOI”) emphasizes that due to Pakistan’s cheap manpower and low production cost coupled with many other reasons, it is a perfect market and location for FDI. This study has examined several aspects of FDI in Pakistan’s context, such as the role it has played in the growth of Pakistan’s economy and may well play in the future. The factors which play motivational and decisive role in foreign investors’ decisions to invest or withdraw their capital such as economic attractions, deterring factors and legal protections afforded to FDI in Pakistan. Existence of deterring factors requires the host State to adopt special measures and offer added protection to foreign investors such as protection through bilateral investment treaties (“BITs”), investment agreements and domestic laws. Therefore, the main concern of this study is the legal protection afforded to FDI in Pakistan. The study has investigated three fundamental factors, directly related to protection of FDI in Pakistan their role and aftermaths; the BITs, the role of higher judiciary and legal protection under domestic statutes. To investigate the first factor, a number of BITs executed by Pakistan have been selected and examined in the light of old and new treaty arbitration cases against Pakistan. It has been revealed that successive Pakistani governments have used BITs as political publicity vehicle and executed this instrument in a haphazard manner, without meaningful negotiations and without understanding the full legal implications. An absolute lack of competency, skills and know-how to negotiate and draft BITs on the part of the Government of Pakistan (“GOP”) has been revealed. The investigation on the role of judiciary, has found a powerful judiciary the Supreme Court of Pakistan (“SCP”) which has emerged as an assertive organ of the State. In last about one decade the SCP has expended the scope of public interest litigation (“PIL”) for enforcement of fundamental rights under unique ‘suo moto’ jurisdiction and endlessly interfered directly in commercial and FDI matters. The current study differentiates judicial activism and judicial interference and argues that, there is a very thin line between these two, and that encroaching on the sphere of other State organs may possibly convert judicial activism into judicial interference. The study has also

examined several domestic statutes related to FDI and has found weak legal protection afforded to FDI under domestic laws of Pakistan. It has revealed that all three factors have exposed Pakistan to costly international arbitration initiated by foreign investors, shattered their confidence which in turn affected inward flow of FDI. To enable GOP to attract the required FDI in the desired sectors this thesis recommends reforms to address these deterring factors and also adopting a pragmatic balanced approach insuring respect of sovereignty of Pakistan and protection of assets of foreign investors.

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List of Abbreviations

AHRC	Asian Human Rights Commission
BDA	Baluchistan Development Authority
BHC	Baluchistan High Court
BIT	Bilateral Investment Treaty
BMI	Business Monitor International
BOI	Board of Investment of Pakistan
BPM5	Balance of Payments Manual 5
CBR	Central Board of Revenue
CCPO	Capital City Police Officer
CDA	Capital Development Authority
CFR	Constitutional Fundamental Right
CHEJVA	Chagai Hill Exploration Joint Venture Agreement
CIPC	Central Investment Promotion Committee
CJP	Chief Justice of Pakistan
CMM	Coal Mine Methane
DAA	Domestic Arbitration Act
DIE	Direct Investment Enterprise
DRP	Dispute Resolution Provision
ECC	Economic Coordination Committee
ECP	Election Commission of Pakistan
EL 5,	Exploration License 5
ELRr	Exhausting Local Remedy Rule
EPZ	Export Promotion Zone
ESAP	Energy Security Action Plan
FBR	Federal Board of Revenue
FCA	Foreign Currency Account
FCAO 2001	Foreign Currency Accounts (Protection) Ordinance 2001
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FY	Fiscal Year
GDP	Gross Domestic Product
GENCO	Central Power Generation Company Ltd
GOB	Government of Baluchistan

GOP	Government of Pakistan
HC	High Court
HRC	Human Right Cell
IAMC	International Asset Management Company
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965
IDP	Internally Displaced Person
IIA	International Investment Agreement
ILC	International Law Commission
IMF	International Monetary Fund
IO	Investigation Officer
IPB	Investment Promotion Bureau
IPP	Independent Power Plant
ISC	Indian Supreme Court
JEP	Joint Equity Participation
JV	Joint Venture
JVA	Joint Venture Agreement
KKEU	Karkay Karadeniz Elektrik Uretim
KPT	Karachi Port Trust
KSE	Karachi Stock Exchange
LHC	Lahore High Court
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational Corporation
MOU	Memorandum of Understanding
NAB	National Accountability Bureau
NAFTA	North America Free Trade Agreement
NAO 1999	National Accountability Ordinance 1999
NATO	North Atlantic Treaty Organisation
NEPRA	National Electric Power Regulatory Authority
NHA	National Highway Authority
NOC	No Objection Certificate

NRO	National Reconciliation Ordinance
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention 1958”)
OECD	Organisation for Economic Co-operation and Development
PCO	Proclamation of Emergency Order
PEPCO	Pakistan Electronic Power Company
PHC	Peshawar High Court
PIB	Pakistan Investment Board
PIL	Public Interest Litigation
PKR	Pakistani Rupee
PML	Pakistan Muslim League
PML(N)	Pakistan Muslim League (Nawaz)
PPP	Pakistan Peoples Party
PSI	Pre-Shipment Inspection Agreement
PSM	Pakistan Steel Mill
PSO	Pakistan State Oil
PTC	Pakistan Telecommunications Corporation
RPP	Rental Power Project
RSC	Rental Service Contract
SBP	State Bank of Pakistan
SCI	Supreme Court of India
SCP	Supreme Court of Pakistan
SEC	US Securities and Exchange Commission
SECP	Securities and Exchange Commission of Pakistan
SIZ	Special Industrial Zone
SJC	Supreme Judicial Council
SRO	Special Regulatory Order
TC	Thar Coalfield
TCC	Tethyan Copper Company Ltd
TCCP	Tethyan Copper Company Pakistan
TDPA 1997	Transmission and Distribution of Power Act 1997
TNC	Transnational Corporation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTP	Tahreek-e-Taliban Pakistan

UNCITRAL	United Nations Commission on International Trade Law
WAPDA	Water and Power Development Authority
WB	World Bank

Declaration

I declare that this thesis is my own unaided work. It is being submitted for the degree of Ph.D. at the University of Bedfordshire.

It has not been submitted before for any degree or examination in any other University.

Name of candidate: Mohammad Raheem Awan

Signature:

A rectangular box with a thin black border, intended for a signature.

Date: 5th December, 2015

CHAPTER 1: INTRODUCTION

1.1 Background and Significance of the Study

Foreign Direct Investment (“FDI”) is one of the significant sources of social, economic and political change in developing countries.¹ It can be used in terms of transferring capital, technology and administrative skills to the host country. It plays a vital role in bringing economic, social and political changes in developing States.² It stimulates and expands the host economies and their economic market, bringing foreign exchange and novel technologies, and creating new job opportunities. Therefore, developing countries enthusiastically endeavour to attract FDI believing it an advantageous and significant tool for their economy.³

Reciprocity of benefits for host nation and investors is an important characteristic of FDI. It is profit-oriented, and flows towards financial markets where opportunities to maximise the profits are greater than the host market of the investor. An ideal business environment and better opportunities to maximise the return of investment in the host country attract and motivate foreign investors. Natural resources, cheap manpower and low production cost coupled with many other reasons make the developing countries perfect and attractive markets for foreign investors. Therefore, having the prospect of maximising their profitability, developing economies have been seen as prime destinations for FDI. It is important to mention here that apart from maximum profit making, the protection of FDI assets is understandably a prime concern of foreign investors whilst making investment in an alien economy. A vigilant investor would always take into consideration the level of protection afforded to him and his assets/investment as well as deterring factors in the host State.

The study has significant relevance in current geopolitical and economic situation of Pakistan as it is an underdeveloped country having 796,095 square km area. The most of the area is unplanned, undeveloped and unexplored in terms of its potential such as

1 Faramarz Akrami, ‘Foreign Direct Investment in Developing Countries: Impact on Distribution and Employment, A Historical, Theoretical and Empirical Study’ (PhD thesis, University of Fribourg, Switzerland 2008).

2 *ibid*

3 *ibid*

agriculture, natural resources, tourism etc. Pakistan's population is around 190 million, scattered all over the country therefore for sustainable economy and poverty alleviation Pakistan is required to improve and utilise strategic tools such as education, health and income redistribution. To improve the livelihoods of its citizen and progression of economy, improvement and construction of infrastructure such as airports, railways, highways, ports and shipping, telecommunication, and provision of housing facilities are also very vital. It is not an easy task for government of an underdeveloped country to arrange budget, funding, technology and skills to execute such mega projects without private and foreign participation. The private and foreign participation can play a long-term, significant role in building and improving these facilities and infrastructures in Pakistan. It may improve the living standards of the Pakistani people on one hand, and on the other is very essential for sustainable development of Pakistan's economy. Therefore, FDI can play a vital role in Pakistan's economy by bringing vital economic, social and political changes.

As said earlier that, FDI is profit oriented and economies offering greater opportunities to earn maximum profit are very likely to be prime destination of the foreign investors. Therefore it is important to examine whether Pakistan offers attractive market and investment opportunities to foreign investors. In relation to Pakistan, the Board of Investment of Pakistan ("BOI") states that Pakistan is an ideal location and perfect market for FDI for five key reasons, namely;⁴ geo strategic location, trained workforce, economic outlook , investment policies and financial markets. BOI asserts that foreign investors have golden opportunities to invest in various sectors such as energy, mining, services and infrastructure development.⁵ However, contrary to this claim, the economic outlook of Pakistan suggests huge variation in the flow of FDI. Until 1990, Pakistan's share in FDI compared to the rest of the world was very meagre. However in the 1990s, improvement in policies, better incentives, opening banned sectors to foreign investors

4 'Five key reasons to invest in Pakistan' (Board of Investment, Government of Pakistan) <<http://boi.gov.pk/InvestmentGuide/FiveReasons.aspx>>.

5 See appendix 2.

and denationalization policy brought some positive impacts on the inward flow of FDI.⁶ At the start of the 21st century, Pakistan adopted new reforms for protection and attraction of FDI such as the promulgation and enactment of new policies and statutes. However, in spite of these policies and legal reforms, Pakistan has been witnessing massive decline in FDI since 2008.⁷

The variation and decline in FDI demonstrate that, either the BOI's claim about economic market and location of Pakistan is fanaticised or there are some deterring factors which are discouraging the foreign investors and hampering inward flow of FDI. This requires identifying the existing problems having potential to negatively influence the foreign investor's decision to invest in Pakistan. Therefore, this study is significant as it investigates whether the problem that affects the inward flow of FDI lies with the potential of Pakistan's economy to attract and absorb FDI, offer attractive profitability to foreign investors or there are other reasons behind such a huge decline? Besides, the variation and decline in FDI may as well lead to existence of potential problems, threats and issues regarding protection of FDI in Pakistan. Therefore, considering BOI's claim, this study examines various theories on host State's responsibility to protect assets of foreign investors, attraction of FDI such as perfect market and perfect location theories. Besides, FDI attraction theories thesis also examines various threats to FDI such as inflation, currency instability, domestic insurgency, political instability and bureaucratic red-tapism. To explore the existing problems, issues and level of protection that FDI affords in Pakistan this thesis has identified four deterring factors, namely; inconsistency in the policies, executing Bilateral Investment Treaties ("BITs") in a haphazard manner without meaningful negotiations, judicial activism and protection of FDI under domestic laws of Pakistan.

6 Ashfaq H Khan, 'Foreign Direct Investment in Pakistan: Policies and Trends' (1997) 4 Pakistan Development Review 959 <www.pide.org.pk/pdf/PDR/1997/Volume4/959-985.pdf> accessed 21 November 2011.

7 Ashfaq Hasan Khan, 'Pakistan's Economic Performance 2008-2010' (*Haq's Musings*, 3 March 2010) <www.riazhaq.com/2010/03/pakistans-economy-review-2008-2010.html> accessed 19 September 2012; Also see appendix 2.

Inconsistency in the policies of the host country is one of the key and essential features to attract FDI which finds its roots in the political stability in the country.⁸ Political disorder and instability may result in changes to the policies of the previous government and affect foreign investors and their investment. Lack of political stability has been the trademark of Pakistan's political history.⁹ Rapid changes in the political governments and frequent imposition of martial law demonstrate the existence of serious political instability in Pakistan. Following the change in political regime almost every subsequent government introduced broad changes in the policies of previous governments.¹⁰ As a matter of fact, inconsistency in the policies created uncertainty about the future of foreign investors as has been seen in the *Hubco Power* case.¹¹ Inconsistency in governmental policies of different governments has been identified in this research as one of the traditional approaches. This factor relates to economic issues and political decision

8 United Nations Conference on Trade and Development, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (UNCTAD Series on International Investment Policies for Development 2009) <http://unctad.org/en/docs/diaeia20095_en.pdf> accessed 14 July 2012

9 Ashfaq H Khan and Yun-Hwan Kim, 'Foreign Direct Investment in Pakistan: Policy, Issues and Operational Implications' (Economic and Development Resource Centre (EDRC) Report Series No. 66, Asian Development Bank July 1999).

10 The process of privatization slowed down significantly with the change in government. As against the privatization of 63 commercial and industrial units in two years (1991/1992 and 1992/1993), only 20 units were privatized in three years (1993/1994 to 1995/1996). In the same way, with the change in government, a sweeping change was made in the Lahore-Islamabad motorway project when Benazir Bhutto's government decided to reduce the motorway to six lanes. Considering the reserve crisis, the government also took the decision to withdraw concession of duty-free imports of machinery agreed to the petroleum and power sectors and to enforce 10% regulatory duty in October 1995. Although after several months efforts the concession was restored, the government thereafter again imposed regulatory duty in the federal budget 1996/1997.

In the same manner, after the dismissal of Benazir's government in 1996 under charges of corruption, grave disagreement between the PML(N)/ Nawaz Sharif's government and IPPs on the purchase of electricity by the WAPDA in 1998, which aggravated investors' confidence. It is pertinent to mention here that IPPs were brought into Pakistan by the previous Benazir government; the investment endorsement condition had been lifted, but other regulations instituting the requirement for other executive endorsement, however, were still in place.

11 *Hubco v WAPDA*, Arb. International 439, 456-58 [2000] reprinted in Mealey's Int'l Arb. rep [2000]

making therefore is out of the scope of a legal research. This factor has been left for economic and political researchers for research in future.

This study mainly focuses on three deterring factors and provides a comprehensive investigation on; executing Bilateral Investment Treaties in a haphazard manner without meaningful negotiations, judicial activism and weak protection to FDI under domestic laws of Pakistan. This thesis investigates whether or not the current legal framework, regulatory regime and development in investment jurisprudence in Pakistan provides adequate protection to foreign investors against above-mentioned deterring factors. The thesis emphasises on restoring the confidence of the foreign investors and to counter aforesaid deterring factors by adopting a pragmatic balanced approach. It simultaneously underlines the need to acknowledge the legitimate expectation of foreign investors to protect their assets, as well as the sovereign rights of the host State to legislate and modify its domestic law, policies and regulatory framework following its domestic needs and changing circumstances. This balanced approach is likely to provide a real sense of protection to foreign investors on one hand, whereas on other it will safeguard the sovereignty and integrity of Pakistan. This obligates the economic and legal experts and negotiators to act with strong motivation, will and commitment to attract and protect FDI coupled with contemporary knowhow, competence and skills by taking into the account the current development in the international investment politics.

1.2 Scope of the Study

Notwithstanding the fact that Pakistan is the pioneer of BITs, there is a scarcity of academic literature on the role and importance of BITs in attraction, promotion and protection of FDI in Pakistan. This scarcity suggests in-depth examination of BITs and their role in sustaining a steady business atmosphere consistent with reasonable expectations of both the host State and investors. To identify the real problems and suggest reforms this study investigates the provisions contained in the selected BITs and various investment disputes between Pakistan and investors such as *S.G.S¹² Bayindir*

¹² *Société Général de Surveillance S. A. v Islamic Republic of Pakistan* (n **Error! Bookmark not defined.**).

*Insaat*¹³, *Karkey v Pakistan*,¹⁴ and *Tethyan Copper v Pakistan*.¹⁵ The latter two are still pending before ICSID tribunals. In light of the results, this study recommends mechanisms to negotiate, draft and execute BITs in the future. A template highlighting the salient features of Pakistan's future model BIT is also suggested.

Judicial activism in Pakistan is a relatively new phenomenon, hence, apart from a few news articles, no comprehensive academic research is available to explain its constitutionality or desirability, or measure its effects. Therefore, to investigate judicial activism in Pakistan, relevant Articles of the constitution of Pakistan are examined and compared with a variety of judicial precedents of the SCP and provincial High Courts of Pakistan. The study provides a comprehensive investigation of judicial activism, with its international and national background and its desirability. By differentiating judicial activism and judicial interference and measuring its effects recommendations are made to address this emerging trend.

With regard to literature discussing on domestic statutes, the situation is not different from the position regarding literature on other factors. There is no significant academic study available on these legal instruments. The Arbitration Act 2011 and Recognition of Enforcement Act 2011 were enacted only a few years ago, therefore, neither any literature nor judicial precedents are available to interpret and explain the scope and provisions of both Acts. The current study investigates the provisions of the aforesaid constitutional and statutory provisions and recommends improvements by finding flaws in said instruments.

1.3.1 Aim and Objectives

The primary aim of this research is to create an original piece of work to develop a balanced approach which protects foreign investors' rights and Pakistan's sovereignty

¹³ *Bayindir v Pakistan* (n **Error! Bookmark not defined.**).

¹⁴ *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 <www.italaw.com/cases/2024>.

¹⁵ *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1 <www.italaw.com/cases/1631> accessed 11 October 2013.

and economic interest equally. This study will identify the desired sectors where Pakistan requires participation of foreign investors and potential threats which obstruct FDI in Pakistan.

By spotting the potential threats and obstacles this study aims to explore flaws in the existing BITs and current domestic laws and suggest a workable proposal so as to improve the existing legal regime and provide better protection to foreign investors. Improvement in BITs and the domestic legal regime in Pakistan will also be helpful to reduce the likelihood of future investment claims against GOP. The objective of the study is to propose reforms and improvements to address the identified factors.

1.3.2 Research Questions

In light of aims and objectives set above this thesis will address following research questions.

1. Whether the current legal framework is satisfactory in terms of adequately balancing the need to ensure effective protection for foreign investors in Pakistan and the need to preserve sovereignty of Pakistan? If the answer is in the negative, how can a balanced approach be developed, which effectively balances the interests at stake?
2. Whether FDI is advantageous for Pakistan? If the answer is yes, whether Pakistan is equally an attractive place for FDI?
3. What are the potential obstacles, threats and problems for FDI in Pakistan?
4. Is the current legal framework adequate to address those threats? In particular:
 - 4.1 Is the protection provided to foreign investors under the current Pakistani legislation adequate to counter the threats identified under sub-question 3?
 - 4.2 Are the BITs ratified by Pakistan designed in such a way to protect both Pakistani sovereignty and investors equally?
5. If the answer to sub-questions 4 is in the negative, how can the current legal framework be improved so as to ensure protection for foreign investors whilst at the same time protecting Pakistani sovereignty?

1.3.3 Structure of Thesis and Key Findings/Arguments

After providing an overview of thesis in chapter 1, the chapter two provides a theoretical discussion to determine the responsibility, obligation and role of the host State to protect

the assets of the foreign investors. The chapter two mainly focuses on various theories and historical development on host State's responsibility to protect assets of foreign investors. The study critically analyses development in international investment law which has gradually moved from pro-State to pro-investor policies i.e shift from absolute immunity of the State to restricted immunity of the State. The earlier acknowledges the sovereign authority and sovereign rights of the host State within its territory and prohibits dragging a sovereign State and its entities in the courts of another country. Whereas, the latter follows a pro-investor approach allowing the foreign investors to escalate their dispute against the host State and its entities directly to the foreign jurisdictions.

Before examining the potential deterring factors and other interlinked issues concerning the protection afforded to FDI in Pakistan, the earlier half of chapter 3 provides an exhaustive theoretical discussion on attraction and benefits of FDI in general and Pakistani context. The study examines the key features, elements, significance and advantages of FDI and its role in sustainable economic development and progression of Pakistan's economy. The sustainable development of the host State and its prosperity are considered as main essence of the modern investment instruments. The sustainable economic development and encouragement of foreign investment flow is said to be main essence and spirit of modern investment agreements such as Pak-German BIT 1959; the first ever BIT. 16

It is significant to mention here that whilst addressing the research question on advantageousness of FDI for Pakistan, it is argued that FDI in every sector would not necessarily benefit the host economy. It may sometime create balance of payment problem, dearth of foreign exchange and revenue and may also harm the domestic industry. Therefore, whilst decision making the economic experts of the Government of Pakistan ("GOP") must identify the desired sectors and sectors of national need where the FDI is actually required. This chapter also evaluates the BOI's claim on Pakistan's attractive and perfect market and location for FDI by answering the research question; if FDI is found to be beneficial for Pakistan's economy and people than whether Pakistan

16 Federico Ortino, 'Investment treaties, sustainable development and reasonableness review: A case against strict proportionality balancing. King's college London, Colloquium Series Seminar 2014.

is equally an attractive place and market for FDI or not? The chapter as well provides theoretical discussion on attraction of FDI which has been tested and were applied on Pakistan. It, as well investigates the potential threats to FDI in two angles i.e general threats in the host economy and deterring factors in Pakistan specifically such as inflation, currency instability, domestic insurgency, political instability etc. It is argued that, the flow of FDI is affected due to issues related to protection of FDI mainly arising because of four deterring factors discussed above out of which three are examined in chapters 4, 5 and 6 separately.

The first deterring factor relates to BITs which is an important instrument of modern era to deal with issues relating to protection of FDI. Chapter 4 addresses the research questions related to BIT protection to FDI and interlinked issues. In light of selected BITs of Pakistan, it comprehensively investigates the concept of protection accorded to FDI, legitimate expectation of the foreign investors and sovereign rights of the host State. The study reflects that, the world's first BIT was signed between Pakistan and West Germany in 1959 ; since then, Pakistan has signed 47 BITs up to 2015 , out of which 35 were concluded from 1988 to 1999(see appendix 1). These treaties have imposed several obligations for the signatory States and created several rights for foreign investors and reflect an unbalanced pro investor approach. The treaties embody the provisions which largely acknowledge extra ordinary protection to FDI including right to recourse to foreign jurisdictions against host State and its entities. Nevertheless, this investigation finds this unbalanced approach against the real spirit of BITs i.e protection of FDI and promotion and encouragement of investment flow for sustainable development of signatory States simultaneously. It is argued that the subsequent governments of Pakistan recklessly executed these treaties and did not bother the legal and economic consequences of executing such treaties. The GOP did not care because, until the end of the 20th century, except for Hubco, no significant case on violation of investment agreements or treaty obligation has been reported against Pakistan. However, at the start of the 21st century, a series of cases on alleged violation of treaty obligations came into limelight against Pakistan, such as S.G.S, Bayindir Insaat and Dallah Real Estate (commercial arbitration).¹⁷

¹⁷ The treaty arbitration matters referred above have been discussed in chapter 4

The study suggests that such unbalanced development of treaty regime that acknowledges extra ordinary rights and over protection for foreign investors is gradually weakening the real spirit/ object and purpose of modern investment instruments. It is argued that the capital importing States such as Pakistan do not execute such instruments merely for protection of FDI. In fact, they trade their sovereignty for the purpose of achieving a sustainable development of their economy and to develop their infrastructure. Therefore, being a capital importing State it is vital for Pakistan that, whilst negotiating and executing BITs, enacting municipal laws and promulgating investment policies it must take into the account the maximum protection to FDI, importance of sustainable long-lasting development and safeguard its State sovereignty simultaneously. To determine if Pakistani negotiators considered these vital aspects whilst negotiating and executing BITs are not, this chapter addresses the following research question; are the BITs ratified by Pakistan designed in such a way to protect both Pakistani sovereignty and investors equally. In the light of selected BITs and treaty arbitration cases against Pakistan it is argued that, Pakistan completely lacks the mechanism, skills and knowhow to negotiate BITs and evaluate their negative economic and legal effects.

It is argued that Pakistan has executed BITs without meaningful negotiations in haphazard manner without taking into the account their aftermaths. Existence of this problem has been confirmed by the former Attorney General (“AG”) of Pakistan in an interview.¹⁸ In his interview, the former AG revealed that these BITs had never been the product of meaningful negotiations. None of the government stakeholders knew that BITs had been signed; no file, record or exchange of notes had ever been maintained to show that any meaningful negotiation ever took place. The maximum level of input to the negotiation that Pakistan had was proof-reading and no significant suggestion was evident. Successive governments have been executing BITs for decades merely for photo shoots of prime ministers and presidents for political point scoring during their external visits. The AG added that Pakistani governments used to sign BITs without taking into

18 Lauge Skovgaard Poulsen and Damon Vis-Dunbar, ‘Reflections on Pakistan’s Investment-Treaty Program after 50 Years: An Interview with the Former Attorney General of Pakistan, Makhdoom Ali Khan’ (*Investment Treaty News*, International Institute for Sustainable Development 16 March 2009) <www.iisd.org/itn/2009/03/16/pakistans-standstill-in-investment-treaty-making-an-interview-with-the-former-attorney-general-of-pakistan-makhdoom-ali-khan>

account what they were signing or what the likely consequences of signing such BITs would be. These treaties offer much protection to the foreign investors, including straightforward access to international arbitration which may leave heavy economic liabilities on the host State. Executing BITs in such a negligent manner and without knowing what has actually been signed raises serious questions on the sanctity of treaties executed by the GOP. It is worth mentioning here that the capital importing countries largely execute BITs on standard terms of capital exporting countries as they want maximum protection for their investors in the host States. Therefore, to avoid any unpleasant situation and costly international arbitration which affect the FDI Pakistan being a capital importing State needs due care, diligence and proficiency to negotiate and execute BITs.

Signing BITs without meaningful negotiations' by and large has negative implications for GOP and foreign investors both. It has provided legal footing and foundation for several investment treaty claims against Pakistan in international jurisdiction. These investment disputes have elevated serious concerns about sovereignty of Pakistan. Besides, it has also spread negative message about Pakistan in investors' community resultantly huge FDI either has fled away or been stuck in mega projects.

This chapter also investigates the conflicting and diverging verdicts of the different arbitral tribunals on similar and identical issues such those in *SGS v Pakistan and SGS v Philippine*. It is argued that such inconsistent awards and diverging interpretations increase further uncertainty on likely outcome of investment disputes and are also fatal in the development of investment treaty jurisprudence. This part of the chapter asserts that at the time of signing such treaties it is vital to clarify, the understanding of the signatory States on vital phrases and terminologies such as investment, legitimate expectation, judicial finality, judicial expropriation, treaty violation etc. Likewise, it further highlights the need to adopt a vigilant and plausible approach to elucidate consensus of signatory parties at earliest possible to adopt or exclude the scope of certain verdicts of arbitral tribunals' on important issues such as *Saipem v Bangladesh*, *Metalclad v Mexico*, *Salini v Morocco* etc.

The second deterring factor; Judicial Activism has been examined in chapter 5. The Judicial activism, where judges assert themselves to dispense justice society, is seen to

be an emerging deterring factor in Pakistan. It is a unique and distinctive feature of Pakistan's current judicial history which finds its roots in allegations of corruption, bribe and kickbacks whilst executing investment contracts and awarding multibillions projects to foreign companies. The allegation of corrupt practices on politicians, senior bureaucrats and investors has provided opportunity to the Supreme Court of Pakistan ("SCP") to expand the scope of Public Interest Litigation ("PIL") and take up such matters directly in the SCP in its original or suo moto jurisdiction. The judges of the SCP can take notice of any event on their own motion without any formal application to highlight the dispute or assert violation of legal rights. This unique authority is called 'suo moto' ('action on court's own motion') jurisdiction. In the last decade Pakistani courts, in the name of enforcement of constitutional fundamental rights ("CFR") and PIL have expanded the scope of *suo moto* jurisdiction to foreign investment and treaty matters. The SCP has scrapped several commercial deals executed by the GOP and other State entities. Allegations of non-transparency, corruption and kickbacks from foreign investors to tailor favourable investment agreements and award multimillion-dollar projects in their favour have opened the gate of judicial activism.¹⁹ The annulment of privatisation of steel mills,²⁰ investment agreements for power generation called 'Rental Power'²¹ and exploration of gold and copper in Reko Diq²² called 'Reko Diq mines' are classic examples of judicial activism in Pakistan in commercial and treaty matters.

19 Annulment of the steel mill privatization, Rental Power Projects and Reko Diq mining project in Baluchistan are most recently examples.

20 *Wattan Party and others v Federation of Pakistan and Other* [2006] SC, SCP Constitution Petition No. 9 of 2006 & Civil Petition Nos. 345 & 394 of 2006.

21 Human Rights Case No. 7734-G/2009 & 1003-G/2010 (Alleged Corruption in Rental Power Plants) and other connected Human Rights Case No. 56712/2010 (Fraud in payment of Rental Power Plants detected by NEPRA). Supreme Court of Pakistan (original jurisdiction) [2012] SCMR 773 30 March 2012 and CMA Nos. 3685-3686 of 2012 in HRC No.7734-G of 2009, accessed 20 April 2013.

22 *Wattan Party and Another v Federation of Pakistan and Others* Constitution Petition No. 69 of 2010: *Qazi Siraj-ud-Din Sanjrani and Another v Federation of Pakistan & Others* Constitution Petition No. 1 of 2011: *Senator Mohammad Azam Khan Swati, etc. v Federal Government etc.* Constitution Petition No. 4 of 2011 & CMA No. 295 of 2011: Human Rights Case No. 5377-P (n **Error! Bookmark not defined.**).

The height of judicial activism can be ascertained from some other important matters whereby the SCP sacked then sitting prime minister of the country by sentencing him for contempt of court. The SCP also issued another contempt of court notice to the succeeding prime minister compelling him to write a letter to Swiss authorities for reopening corruption cases against then-sitting president of Pakistan. To avoid disqualification of another Prime Minister government managed to get passed Contempt of Court Act 2012 from parliament. However, this attempt to curtail powers of SCP through legislation also remained unsuccessful when SCP struck down said disputed legislation²³ by declaring it unconstitutional and illegal law.²⁴ This extreme exercise of judicial power under constitutional authority *suo moto*²⁵ demonstrates the authority of superior judiciary to revisit any treaty, agreement and piece of legislation to determine its legality, constitutionality and validity. Another important aspect of judicial activism in Pakistan is exercise of *suo moto* by the High Courts, despite it being largely clear that *suo moto* or similar power is not available for the High Courts. It is argued that this emerging trend of judicial activism is unlikely to give any comfort to foreign investors and raises questions as to the sanctity of agreements and treaties signed by the GOP.

This thesis also addresses the question of judicial activism and its desirability in Pakistan and argues that due to corrupt practices, privileged legislation in favour of elite class, bad governance etc the judicial activism is a popular and most desired phenomenon in Pakistan. The lawyers' community, civil society and media have huge expectations from apex judiciary to curb the social, economic and political evils from Pakistan. Consequently, to satisfy such anticipations the judges cross their constitutional limits and encroach upon the rights and authorities of other organs of the State. Chapter 5 also examines the trichotomy of power prearranged in the constitution which has already defined the limits, scope and powers of all three organs of the State: the legislature, executive and judiciary. Indeed, it may be argued that encroaching upon the predefined rights and domain of any other organ of the State would itself be treated as judicial

23 *Baz Muhammad Kakar & another v Federation of Pakistan through Ministry of Law & Justice, Islamabad & others* Constitution Petition No.77 of 2012 etc. In The Supreme Court of Pakistan (Original Jurisdiction) 3 August [2012].

24 *ibid*; 'Pakistan Judges Strike down New Contempt Law' *BBC News* (3 August 2012) <www.bbc.co.uk/news/world-asia-19117746> accessed 6 August 2012.

25 Constitution of Pakistan 1973 art 184(3).

interference hence amounts to violation of the constitution. Therefore, it is necessary to distinguish judicial activism and judicial interference as there is a very thin line between both.

After investigating judicial activism in previous chapter, the Chapter 6 of this thesis deals with protection granted to FDI under domestic laws. It is observed that apart from international and bilateral treaties, Pakistan offers protection to FDI through several domestic legal instruments. The chapter examines constitutional and statutory provisions related to FDI. The significant legislation which deals with FDI include: Art 18 and 24 of the Constitution of Pakistan 1973, the Foreign Private Investment (Promotion & Protection) Act 1976 ("FPIA"), the Protection of Economic Reforms Act 1992 ("PERA"), the Arbitration Act (International Investment Dispute) 2011 and Recognition of Enforcement (Arbitral Agreement and Foreign Arbitral Awards) Act 2011. It is worth arguing here that in order to protect FDI and give confidence to foreign investors the domestic legal environment also plays a significant role. Better protection and reliable domestic legal regime influence the decision of foreign investors to make cross-border investments. A country offering better legal protection and rights to foreign investors in its municipal laws may better appeal to foreign investors.

It is observed that, the guarantees provided in Art 18 & 24 of the constitution of Pakistan are significant as they provide protection to FDI somewhat similar to the BIT protection such as protection against acquiring the property without due process of law, expropriation for the public purpose followed by adequate and prompt compensation etc. The study argues that despite constitutional protection and acknowledging private property rights there is a huge room for improvement because of weak domestic legal regime for FDI. The domestic laws appear to be outdated and not capable to address the contemporary issues of FDI. Similarly, the newly enacted laws clearly lack rules and some vital interpretations which are relatively necessary as no case law is available to address the confusing terms and phrases.

In the light of investigation and debate carried out in chapter 2-6, chapter 7 provides some suggestions to address the aforementioned three deterring factors.

Chapter 8 is conclusion of entire research and summarises what has been investigated in this thesis and its results.

1.4 Literature Review

This thesis is going to examine a variety of literature surrounding a number of issues concerning FDI such as theoretical discussion on benefit of FDI for host State, attraction of FDI, host State's responsibility to protect private property. Literature surrounding FDI issues in Pakistan specifically is also examined which includes motivational factors for foreign investors, benefits of FDI for Pakistan, policies adopted for negotiating and concluding BITs, proactive role of apex judiciary and legal issues and protection under domestic laws of Pakistan.

1.4.1 Literature providing theoretical discussion on benefits of FDI

The literature available on FDI and its benefits for the host economy denotes that, scholars are divided on the issue whether FDI is beneficial to the host economy or not. Some scholars²⁶ believe FDI is essential for a host State as it helps in the development and growth of its economy. Salisu²⁷ and Moran²⁸ argue that, FDI plays a considerable role in the development of the host country, by improving its economy and growing the income level of its citizen²⁹. FDI also introduces new technology and trends in the host

26 Sanjaya Lall, 'Vertical inter firm linkages in LDCs: an empirical study' (1980) 42(3) Oxford Bulletin of Economics and Statistics 203; Michael Klein, Carl Aaron, and Bitu Hadjimichael, 'Foreign direct investment and poverty reduction' (Policy Research Working Paper No 2613, World Bank 2001); David W Loree and Stephen E Guisinger, 'Policy and nonpolicy determinants of US equity foreign direct investment' (1995) 26(2) Journal of International Business Studies 281; Linda S Goldberg and Michael Klein, 'Foreign Direct Investment, Trade and Real Exchange Rate Linkages in Developing Countries' in Reuven Glick (ed), *Managing Capital Flows and Exchange Rates: Perspectives from the Pacific Basin* (Cambridge University Press 1998) 73; Beata S Javorcik and Mariana Spatareanu, 'To Share or Not To Share: Does Local Participation Matter for Spillovers from Foreign Direct Investment?' (Working Paper 2006-001, Rutgers University Newark 2006) <<http://ideas.repec.org/p/run/wpaper/2006-001.html>> accessed 19 August 2011.

27 Vudayagi N Balasubramanyam, M Salisu and David Sapsford, 'Foreign Direct Investment as an Engine of Growth' (1999) 8(1) Journal of International Trade and Economic Development 27.

28 Theodore H Moran, 'FDI and Development: What Is the Role of International Rules and Regulations?' (August 2003) 12(2) Transnational Corporations, United Nations Conference on Trade and Development, Division on Investment, Technology and Enterprise Development 1.

29 *ibid*.

country which lead to growth in living standards and reduction of poverty levels.³⁰ Yussof and Ismail³¹ are of the view that, apart from other advantages, FDI also creates an environment of competition with domestic/local investors which enhances the quality of products and services. It reduces prices by challenging monopolies and leads towards a competitive environment for better job opportunities by providing novel skills and training to the workforce. According to Brooks and Fan,³² FDI has effectively demonstrated itself as a source of introduction of latest technology, facilities and progress in developing countries.

Contrary to this, other group of scholars³³ like bin Atan³⁴ and Dunning and Blomstrom³⁵ have criticised FDI as being risky and destructive for the domestic economy, only helpful to a very small part of the financial market and damaging to domestic investment. Critics of FDI believe and claim that FDI is unable to play a leading role in expansion of the

30 Balasubramanyam, Salisu and Sapsford, 'Foreign Direct Investment as an Engine of Growth' (n 27).

31 Ishak Yussof and Rahmah Ismail, 'Human Resource Competitiveness and Inflow of Foreign Direct Investment to the ASEAN Region' [June 2002] 9(1) Asia-Pacific Development Journal 89.

32 Douglas H Brooks, Emma Xiaoqin Fan, 'Foreign Direct Investment In Developing Asia: Trends, Effects, And Likely Issues For The Forthcoming WTO Negotiations.' (ERD Working Paper No. 38 April 2003).

33 Xiaolun Sun, 'Foreign Direct Investment and Economic Development: What Do the States Need to Do?' (Foreign Investment Advisory Service for the Capacity Development Workshops and Global Forum on Reinventing Government on Globalization, Role of the State and Enabling Environment, United Nations 2002) <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006348.pdf>> accessed 4 January 2012; Khan (n 7); Nuzhat Falki, 'Impact of Foreign Direct Investment on Economic Growth in Pakistan' (2009) 5(5) International Review of Business Research Papers 110 <www.wbiconpro.com/14-Nuzhat.pdf> accessed 13 October 2011.

34 Ghazali bin Atan, 'The effects of DFI on trade, balance of payments and growth in developing countries, and appropriate policy approaches to DFI' (Third World Network, Penang 1996).

35 JH Dunning, B Kogut and M Blomstrom, '*Globalization of firms and the competitiveness of nations*' (Institute of Economic Research, Lund University 1990).

whole economy and contributes in only a very small area of the economy.³⁶ Khan,³⁷ Fraser³⁸ and Falki³⁹ also have the same view and assert that FDI adds in certain areas of the economy, but contains risks of destabilizing the economy of the host developing country. Concerns shown by these critics are not far-fetched and cannot be ignored hence require policy maker's serious consideration while making policies. Despite all this, the statistics show that in recent years developing countries were very enthusiastic to attract FDI⁴⁰ which has proven to have very positive results for growth of their economies.⁴¹ The developing countries used modern investment treaties and agreements as motivational tool to attract FDI. According to Ortino, object and purpose of such treaties is not merely to accord protection to FDI as assumed by some arbitral tribunals. He asserts that, in fact, the purpose of executing these treaties and agreements is to "intensify economic cooperation, encourage/promote international capital flows and increase the prosperity of both contracting parties."⁴² He emphasises on importance of preamble of such treaties in defining their long-term purpose, prosperity or development of the signatory States and argues that "the long term purpose of investment treaty is sustainable

36 See Khan (n 7); Julia M Fraser, 'Lessons from the Independent Private Power Experience in Pakistan: The Energy and Mining Sector Board' (Paper No.14, The Energy and Mining Sector Board, World Bank Discussion 2005) <<http://info.worldbank.org/etools/docs/library/240338/Lessons%20from%20the%20Independent%20Private%20Power%20Experience%20in%20Pakistan.pdf>> accessed 13 March 2012; See Falki (n 33).

37 Khan (n 7).

38 Fraser (36).

39 Falki (n 33).

40 Jimmy J Zhan, 'FDI Statistics: A Critical Review and Policy Implications' (Paper prepared for the World Association of Investment Promotion Agencies (WAIPA) Geneva, October 2006) <www.waipa.org/pdf/SurveyResults/Problems_with_FDI_statistics.pdf>.

41 Jung Wan Lee, Gulzada S Baimukhamedova, Sharzada Akhmetova, 'The Effects of Foreign Direct Investment On Economic Growth of A Developing Country' (2009) 12(2) Allied Academies International Conference 22.

42 Federico Ortino, 'The Investment Treaty System as Judicial Review' King's College London Dickson Poon School of Law Legal studies Research Paper Series, paper no. 2014-23

development.”⁴³ Besides, he highlights the growing understanding on considering modern investment instruments as a vital tool to achieve sustainable development of the host State. With regard to concept of development he suggests that it should be considered wider method which covers “economic, social, political and legal considerations.”⁴⁴ Consequently, it may be argued that the sovereign States trade their sovereignty to attract FDI to support their economic market and strengthen the economy therefore it is vital that FDI backs the host State in establishing a long-lasting development and sustainable economy.

1.4.2 Literature providing theoretical discussion on attraction of FDI

There are various hypotheses about attraction of FDI in a foreign economy. These theories examine the preferences of investors when they tend to invest in an alien economy and the aspiration and inclination of host economy to attract and absorb the FDI. Most significant theories include perfect location, perfect market, differential rates of return, and the portfolio diversification theory etc. Location theory relates to the flow of FDI, primary focus being location, and benefits such as access to vital international markets, production near to the resources, consumer, and shipping.

Lizondo⁴⁵ classifies FDI theories into *perfect market theory*, *imperfect market theory* and *theories based on other factors*. Perfect market theory is further divided into three hypotheses, *differential rates of return theory*, market size theory and *portfolio diversification theory*. The theory of differential rates of return provides that investment flows from the market having low return rates to the market having higher rates of return. Market size theory assumes that the investor is influenced by the market size while taking

43 Federico Ortino, “Investment Treaties, Sustainable development and Reasonableness Review: A case against strict proportionality balancing. Centre of Transitional Legal Studies, King’s College London Colloquium Series Seminar fall 2014

44 Federico Ortino, ‘Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges’ E15 Task Force on Investment Policy, Think piece. International Centre for Trade and Sustainable Development (ICTSD) June, 2015

45 José Saul Lizondo, ‘Foreign Direct Investment’ (Working Paper WP/90/63 Research Department, International Monetary Fund 1990).

a decision to invest in a particular economy. For this purpose, size of the market is measured by its Gross Domestic Product (“GDP”) or by the sales of the Multinational corporations (“MNC”). GDP is used in several studies to explore the link between flow of FDI and GDP, being supportive to the theory that high increase in sales and income of the host country has a direct positive link with attraction of FDI.

Portfolio diversification theory is based on two variables that influence the decision of the investor to invest in a particular market: the rate of return and risk.⁴⁶ According to Moosa,⁴⁷ this theory is comparatively better than differential rate theory, as it offers reasonable justification for cross-border investment and also takes several risks into account which influence the decision of investors, such as policy, political, country risk and currency exchange rate. Portfolio diversification theory provides that the rates of return and risk are two variables which can affect the decision of foreign investors to invest in the host economy offering perfect market and/or perfect location to them.

It is understandable that one theory would not fit to all. One particular theory may be successful in one economy but at the same time would not work in another economy. Therefore, application of these theories may vary country to country and economy to economy as each and every State and economy have its own advantages and disadvantages.

1.4.3 Literature providing discussion on the State’s responsibility to protect private property

The concept of State’s responsibility to protect private property evolved and developed gradually. Historically it developed from principle of absolute immunity of State to restricted immunity of State. Absolute immunity of State recognizes the rule of customary international law that one state cannot be sued in the courts of another for acts performed “iure imperii”⁴⁸; the rule is “par in parem non habet imperium.”⁴⁹ The principle is derived from the sovereign nature of exercise of the State’s adjudicative powers and the basic

46 Ibrahim Onour, ‘Unification of Dual Foreign Exchange Markets’ (2000) 33(3) *Economic Change and Restructuring* 171.

47 Imad A Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002) 37.

48 ‘The imperial, public acts of the government of a State.’

49 ‘equals do not have authority over one another’.

principle of international law that all states are equal. Therefore, the international law recognizes the Sovereign States' right to take hold of the assets of any organization or individuals and did not obligate the expropriating State to pay compensation to affected party.

Choudhury⁵⁰ suggests that State sovereignty represents its independence which denotes global recognition of its respect and identifies the authority to promulgate and enforce its laws, policies within its territories. Therefore, the sovereignty of a State signifies that it may regulate and promulgate its policies regarding matters to which it has concerns such as matters of public interest. Instant doctrine therefore advocates for the freedom of the State to fix national protocols related to human rights, environmental safety, State emergencies or affirmative action in order to exercise their independence.⁵¹ Bonfanti⁵² contends that policies or legislation addressing the public concerns, protecting interests of the citizens or in the State's interest were not probably intended to be restricted by the requirements of investment agreements. According to him a State can directly expropriate or nationalize the private assets or its profit making by means of formal transfer of ownership or physically seizing private assets however it is vital to determine, that such policy was really been adopted in the public interest or just disguises nefarious designs behind so called public or State interest.

Choudhury however, is of the view that the possibility of adverse State actions resulting huge conflict of interest between State and investor requires extended protection against any arbitrary act of the host State in the neutral venues.⁵³ This necessitates that organisations or individuals involved in commercial operations with State entities or in cross border commercial activities shall have right to challenge the arbitrary acts of the host State. Nevertheless, it is vital to determine whether a sovereign State can legislate in

50 Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 776.

51 *ibid*

52 Angelica Bonfanti, 'Indirect Expropriation Under International Investment Law' (2012/2013 Corso di Laurea Magistrale in Giurisprudenza, Milan University).

53 Choudhury (n 50).

the context of public interest which is contrary to the private property rights of the investors. Rechtsanwalt⁵⁴ argues that, possibility to sue a sovereign State in a venue other than the host State was hindered by numerous principles and doctrines; immunity of jurisdictional restriction, restrictions on subjecting sovereign nations to third State jurisdictional⁵⁵ restrictions as code of foreign/diplomatic policy. Challenging the act of the host State requires State's consent and submission to international tribunals which was contrary to the principles of sovereign immunity. Choudhury concludes that this issue was address by emergence of international investment treaties and since then the doctrine of restricted immunity developed exponentially. Notwithstanding the sovereignty of the State, such investment treaties whereby States' agree to address investment disputes by surrendering their sovereignty before international forums enable the aggrieved foreign investors to direct recourse to international arbitral forums.

As said earlier, the State's responsibility to protect private property evolved gradually and during this process various important doctrines were introduced. The Calvo Doctrine is one of the significant primary doctrines amongst others which attempted to address the State investor relationship. According to Bordukh⁵⁶ the doctrine imposes two obligations in relation to aliens' arrival into overseas investment arena; compulsorily surrender the diplomatic protection available to foreign investors under other international treaties and exclusively rely on local remedies available under municipal laws of the host nation. Besides, foreign investors would enjoy rights and privileges similar to the domestic investors meaning that they must not be given more privileges than the nationals of host country. Additionally, the domestic legislation shall be applicable and domestic courts will have jurisdiction to adjudicate upon the disputes arising from foreign investment. Bordukh asserts that the doctrine was an idea grounded on aforementioned minimum two guidelines in relation to the legislation of customary international. The doctrine could not get the status of international law but rationality of the clauses of the doctrine was never

54 Stephan W. Schill, 'Enabling Private Or Dering - Function Scope and Effect of Umbrella Clauses in International Investment Treaties' (International Law and Justice Working Papers 2008/9 New York University School of Law).

55 Nation doctrine.

56 Oyunchimeg Bordukh, 'Choice of Law in State Contracts in Economic Development Sector - Is There Party Autonomy?' (PhD thesis, Bond University School of Law, 2008).

completely repudiated during the procedures of jurisdictional decisions.⁵⁷ The example of the practice of this doctrine includes recognition of exhausting local remedy rule first in international forums under certain conditions unless clearly waived in investment agreement or in bilateral treaty. These conditions include denial of justice,⁵⁸ finality of a judicial act,⁵⁹ clear treaty violation⁶⁰ or obligation.⁶¹

Mavluda⁶² asserts that the Loewen decision reinstated the ELR under the excuse of judicial finality rule and also disregarded the clear provisions of the North American Free Trade Agreement (“NAFTA”) and ICSID convention. Reacting on abovementioned decisions, Schreuer called them ‘Calvo’s grandchildren.’⁶³ He asserted that such judgments seem very close to reinstating the exhausting of the local remedy principle in international arbitration. If principally foreign investors are obligated to follow ELR no one could stop moving one step further to exhaust local remedy as a rule. Disguising the ELR under judicial finality, distinguishing contractual and treaty violation under the paradigm of FET etc will deprive foreign investors from relying on multiple causes of actions in their claim as well as will revert investment treaty jurisprudence to the Calvo doctrine.

57 *ibid*

58 *Loewen v United States* ICSID Case No. ARB(AF)/98/3 Award dated 26/6/2003 <www.italaw.com/sites/default/files/case-documents/ita0470.pdf>.

59 *ibid* paras 163-164, 168, 217.

60 *Generation Ukraine, Inc. v Ukraine* ICSID CASE No. ARB/00/9 16 September 2003 paras 20-30 <www.italaw.com/sites/default/files/case-documents/ita0358.pdf>.

61 *Waste Management, Inc. v United Mexican State* ICSID Case No ARB(AF)/00/3 April 30, 2004 para 116 <www.state.gov/documents/organization/34643.pdf>.

62 Mavluda Sattorova, ‘Denial of justice disguised? Investment arbitration and the protection of foreign investors from judicial misconduct’ part IV *Loewen v United States*: Reinstating the Local Remedies Rule in Denial Of Justice Claims’ (2012) *International & Comparative Law Quarterly*.

63 Christoph Schreuer, ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’ (2005) 4 *The Law and Practice of International Courts and Tribunals* 1 <www.univie.ac.at/intlaw/pdf/cspubl_75.pdf>.

Marvin⁶⁴ highlights the features of another important formula to protect private property called 'Hull Formula' which entails that expropriation should be followed by compensation which must be 'prompt, adequate and effective'. He explains these phrases as, "Prompt denotes that compensation be, at the very least, 'speedy' (if not immediate), 'adequate' means that the property be given an appropriate valuation which comes 'close to its full or fair market value, and 'effective' describes a payment method that is usable and negotiable." According to him an admirable number of existing BITs are using a developed approach of Hull formula.⁶⁵

Marvin further argues that, the proposal contained in Calvo Doctrine to regulate the compensation for nationalisation or expropriation under domestic law of the host country was gradually taken over by the proposal to govern such aspects of the foreign investment under international law. However, despite the fact that cross border economic activities had significantly increased a cohesive international legal framework was missing which could govern issues surrounding foreign investment. Lowenfeld,⁶⁶ reflects that the main barrier was the enthusiasm of the capital exporting States to protect their investors and nationals on one hand and on other underdeveloped countries' desire to attract foreign investment without compromising their regulatory sovereignty. Besides, the General Assembly of the United Nations recognised the sovereign rights of the nations over their natural resources through a unanimous Resolution on Permanent Sovereignty over the Natural Resources. The Resolution contained a number of provisions regarding State sovereignty and autonomy. This appeared to be somehow frightening and undesirable for foreign investor hence damaging for promotion of foreign investment.⁶⁷

Nagan and Root,⁶⁸ argue that State's legislation to confiscate investors' property may amount to a violation of other protections afforded by the investors. Moreover, regulatory

64 Marvin Rowe, 'Expropriation According to the Hull formula', 24 October 2012.

65 *ibid*

66 General Assembly Resolution 1803 (XVII), U.N. Doc. A/5217/Supp. No. 17 (Dec. 14, 1962).

67 *ibid*

68 Winston P. Nagan and Joshua L Root, 'The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory' (2013) 38(2) North Carolina Journal of International Law 375.

intervention with investments may also be a violation of the pre-arranged and agreed provisions of fair and equitable treatment, most favoured nation treatment, and national treatment. According to Nagan and others, though the States were resistant from legislation linking to their “public acts” but a number of States were not resistant from legislation for their “private acts” comprising commercial activities. They highlighted several instruments surrounding the restricted immunity and sovereignty of the State such Foreign Sovereign Immunities Act of 1976 (“FSIA”) of USA, the “European Convention on State Immunity” and an “Additional Protocol” the United Nations Convention in relation to legal Immunities of Nations which may assist as an original international standard in the arena of State immunity.

According to Harrison,⁶⁹ customary international law recognizes the host State’s right to expropriate foreign assets hence a host State cannot be refrained always from nationalizing investors’ assets especially foreign nationals. Besides customary international law, the modern legal instruments also recognise this right largely such as foreign investment law/treaties and BITs. These instruments indorse host State’s right to expropriate private assets subject to certain conditions; expropriation is for public purpose, without any discrimination, followed by adequate compensation and with due process of law.⁷⁰

Santiago Montt⁷¹ contends that a number of modern investment treaties provide direct cause of actions to foreign investors before international arbitration forums to seek damages against the host State. According to him, direct cause of action along with standard of fair and equitable treatment and obligation to compensate for indirect expropriation have changed the States’ responsibilities to protect private property under international law. Whilst developing and proposing his theory of updated Calvo Doctrine, Montt vehemently critiques the arbitral tribunals’ approach to stretch “*super protection*”. Portraying his updated Calvo Doctrine Montt suggests that, “BIT jurisprudence should

69 James Harrison, ‘The Protection of Foreign Investment’ (2010) XVIII Section I reproduced in Marvin Rowe, ‘Expropriation According to the Hull formula’, 24 October 2012.

70 *ibid*

71 Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation* (Hart 2009).

not crystallize rules of protection of investments that are more demanding than those which developed countries' courts apply in favour of their own national investors.”

Browlie⁷² argues in the same line stating that, as a general rule of international law, a State could not be held responsible for its actions or policies adopted for the public purpose though breaches the State-investor commercial contract and adversely affect the property rights of investors unless proven to be discriminatory or lacking due process of law.

Montt's and Browlie's point of view is completely in line with the Judge Higgins point of view in *Martini* case whereby he said that, *“In my view the right distinctions are here being drawn: governments may indeed need to be able to act qua government and in the public interest. That fact will prevent specific performance (including restitution) from being granted against them. But that is not to liberate them from the obligation to compensate those with whom it has entered into specific arrangements. That is the reasonable place to strike the balance between the expectations of foreign investors and the bona fide needs of governments to act in the public interest.”*⁷³

Literature reviewed in this section reveals the gradual transformation of doctrine of absolute immunity of the States into doctrine of restricted immunity of the States. This gradual shift has increased the host State's obligations to protect private property right and observe its commercial contracts and commitments. However, at the same time an admirable number of scholars and treaty decisions recognise the host State's right to expropriate private assets either direct or indirect subject to non-discriminatory measures, provision of prompt and adequate compensation and for public purpose.

1.4.4 Literature on Bilateral Investment Treaties

BIT is a primary source to define the right and obligations of the signatory States and their investors. It is one of the legal instruments which guarantee certain rights to investors of contracting States. According to Andrew BITs are meant to encourage,

⁷² Ian Browlie, *Principles of Public International Law* (7th ed. 2008) 547.

⁷³ Quoting R Higgins, *The Takings of Property by the State: Recent Developments in International Law*, (III) *Collected Courses of the Hague Academy of International Law* 338 (Legal Authorities LA-7) reproduced in: Case 1:09-cv-00248-RBW Document 1-2 Filed 02/06/2009 p. 62 <www.italaw.com/documents/NGvArgentina.pdf>.

promote and protect FDI in alien economy therefore, more or less all BITs cover similar features such as describing investment, its scope and time element. BITs also contain provisions describing the level of treatment afforded to FDI, safeguard against direct or indirect expropriation and dispute resolution mechanism. Most favoured nation “MFN” clause guarantees that the host State will treat parties of one treaty not less favourably than the treatment they grant to the parties under the other treaties whereas, fair and equitable treatment “FET” clause necessitates the host State to evade from treating foreign investor with arbitrary or discriminatory acts. . The BIT clauses containing these phrases appeared to be most controversial hence contested in the treaty tribunals. According to Nyombi most of the arbitration claims were escalated to international arbitration on alleged expropriation and violation of FET and MFN standards provided to foreign investors under BITs and IIAs.⁷⁴ He contends that BITs largely failed to strike a balance between investor-State rights and obligations which could undermine the sovereignty of the host State; “the storm have been gathering for decades” as modern investment instruments have largely failed to balance the treaty rights and obligations in favour of host State.

It may be observed that the arbitral tribunals whilst dealing with such open-ended and tricky provisions, reached to divergent and inconsistent outcomes on similar matters such as *SGS v Pakistan* and *SGS v Philippine*.

The divergent and inconsistent interpretation created further uncertainty in likely outcome of State-investor dispute. Ortino calls such diverging opinions a fact of life of investment treaty law and a goldmine for academics, he examined diverging opinion of tribunals on variety of issues such “concept of investment to determine the scope of investment treaties and jurisdiction of the tribunals, the content of the various substantive protections guaranteed by investment treaties (such as fair and equitable treatment

⁷⁴ Chrispas Nyombi, ‘EU Reforms of International Investment Law in the Shadow of Brexit’ *International and Commercial Law Review* vol. 27 Issue 10 (2016) Forthcoming

standards or the notion of indirect expropriation), and the role of investment (arbitral) tribunals ...” 75

To address legal uncertainty on such substantive provisions of modern investment instruments which gave rise to the divergent opinion of arbitral tribunals on similar issues, he suggests to concentrate on spelling out the limit and latitude of protection traditionally granted to FDI in such treaties. He further emphasises on clarifying key phrases and provisions such as available remedies, expropriation, FET and MFN etc. To avoid any ambiguity and doubt, Schreuer, Muchlinski and Ortino consider it a significant task to define and interpret such treaty standards in a consistent and clear manner. Though, every BIT may have its unique features and provisions as it is deemed to be a creation of negotiations between signatory parties. However, due to treaty formulation standards BITs still have a degree of similarity which may lead to explicit interpretation of important phrases and provisions. 76

Studying relationship between BITs and flow of FDI, Seriki⁷⁷ points out Argentina’s shaky position where it had to face 40 BIT claims in ICSID tribunals since 1992 whereas it attracted only \$2 billion FDI in 2005. Seriki argues that in contrast Brazil has attracted \$11.37 billion FDI though it did not have enforced even a single BIT. The World Bank’s research group’s study on twenty years of FDI flow from OECD States to developing States concluded that they could found very weak evidence that BITs really encourage

75 Federico Ortino, “Investment Treaties, Sustainable development and Reasonableness Review: A case against strict proportionality balancing. Centre of Transitional Legal Studies, King’s College London Colloquium Series Seminar fall 2014

76 Schreuer, Muchlinski and Ortino, ‘International Law on Foreign Investment: Final Report’ RIO De Janeiro Conference (2008) International Law Association

77 Susan Rose-Ackerman and Jennifer Tobin, ‘*Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties*’ (Yale Law and Economics Research Paper No. 293 2005) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121. Reproduced in Hakeem Seriki, ‘*Umbrella clauses and investment treaty arbitration: all encompassing or a respite for sovereign states and state entities?*’

the FDI: “Analysing twenty years of bilateral FDI flows from OECD to developing countries finds little evidence that BITs have stimulated additional investment”.⁷⁸

Whether BITs encourage the FDI or not? A difference of opinion among treaty scholars on the role of BIT in stimulating FDI in the host State is evident in different studies. Michael Reisman ⁷⁹says that BITs persuade foreign investors to invest their capital in the economy of signatory State. Dolzer states that BIT influences foreign investors by providing assurance of special handling and level of protection including special treatment, national treatment and fair and equitable treatment. These clauses sustain a steady business atmosphere consistent with reasonable investors’ expectations by requiring the host State to evade from treating foreign investors in arbitrary or discriminatory manner. However, contrary to this, The World Bank’s research group’s Study on twenty years FDI flow from OECD States to developing States concluded that they could found very weak evidence that BITs really encourage the FDI. Report suggested that in riskier environment relationship of FDI and BITs is very weak and it is only beneficial in less riskier and financially stable markets.

1.4.5 Literature on influential factors and risks to FDI

Khan and Kim identified some factors which influenced the decisions of foreign investors in various decades. These contributory factors are war, insurgency, devaluation of currency, political instability, inconsistency in policies and corruption. Aqeel and Nishat indicated that adoption of varying policies by GOP to attract FDI in different decades had damaging impacts on inward flow of FDI to Pakistan. Wang and Swain expand the scope of political instability asserting that, it also includes sudden changes in domestic laws and economic structure in the host country.

Policy, political and country risk and currency exchange are a few important, influential factors in cross-border investment decisions. Mubarak considers political instability in

⁷⁸ Mary Hallward-Driemeier, ‘Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit ... and They Could Bite’ (World Bank Policy Research Working Paper No. 3121 June 2003).

⁷⁹ W Michael Reisman, Mahnoush Arsanjani and Gayl Westerman, *International Law in Comparative Perspective* (Casebook, Foundation Press 2004) 460.

the host country discourages FDI and asserts that the notion of political instability also includes sudden changes in domestic law/ statutes and economic structures.⁸⁰ According to Wang and Swain, foreign investors prefer to invest in a politically stable and free market system. The taxation policy of the host country is another important factor which influences the foreign investor's decision to invest in such host country; tax holidays and incentives help to attract FDI. Moosa, Louis and Kinda argue that *Currency and exchange rate threat* is based on the argument that investors from a strong currency zone are most likely to invest in a weak currency zone. By comparison, investors from a weak currency zone are less likely to invest in a strong currency zone. This fact can be verified from the general trend of FDI which flows from countries having a strong currency to countries having a weak currency. It also takes into account capital market relationship, foreign exchange risks and the market's preference for holding assets in a strong currency. Moosa confirms⁸¹ that currency exchange rate and vulnerability of currency largely influence the cross-border investment decision.

Literature available on the political instability and FDI denotes that FDI flows towards the economies where policy regime is friendly and consistent.

1.4.6 Literature on FDI and influential factors in Pakistan

According to Qamar Baig⁸², Pakistan's history of policy making demonstrates that the trade policy formulation in Pakistan remained inconsistent and inadequate. In the 1960s,

80 Zhen Quan Wang and Nigel J Swain, 'The Determinants of Foreign Direct Investment in Transforming Economies: Evidence from Hungary and China' (1995) 131(2) *Zeitschrift des Instituts für Weltwirtschaft an der Universität Kiel* 359 <www.econbiz.de/Record/the-determinants-of-foreign-direct-investment-in-transforming-economies-empirical-evidence-from-hungary-and-china-wang-zhen-quan/10001182586> accessed 5 January 2014.

81 Moosa (n 47); International Monetary Fund, 'Foreign Direct Investment in Emerging Market Countries' (Report of the Working Group Capital Markets Consultative Group September 2003) <https://www.imf.org/external/np/cm/cg/2003/eng/091803.pdf> accessed 17 November 2014; World Bank, 'Shifting Forms of Equity Finance for Developing Countries' (Chapter 3) http://siteresources.worldbank.org/GDFINT/Resources/gdf_chapter3.pdf accessed 17 November 2014; Jean-Louis Combes, Tidiane Kinda, Patrick Plane, 'Private Capital Flows and the Real Exchange Rate in Developing Countries' CERDI-CNRS, Université d'Auvergne.

82 Mirza Qamar Baig, 'Pakistan's Trade Policy, 1999–2008: Government Economic Policies An Assessment' (Working Papers, Pakistan Institute of Development Economics 2009) 55 <<https://ideas.repec.org/p/pid/wpaper/200955.html>> accessed 26 December 2013.

government policies were aimed at encouraging the private sector. Dr. Ishrat States that, in Ayub's regime Pakistan emerged as a "developmental State" from a "soft State," *"Though speculative, it is possible that, had the economic policies and programs of Ayub regime continued over the next two decades, Pakistan would have emerged as another miracle economy."*⁸³ In the 1970s the public sector was given the dominant role when Bhutto government nationalised industrial sector and banks. Ashfaq and Kim point out that, contrary to the private sector was once again assigned a leading role 1970s in the 1980s and 1990s. Throughout the 1990s, Pakistan adopted liberal, market-oriented policies and declared the private sector the engine of economic growth.⁸⁴ Accordingly some improvement in inward FDI in the 1990s has been seen when foreign investors invested their capital for establishing the Independent Power Plants ("IPPs"). However Julia Fraser⁸⁵, Ashfaq and Nuzhat assert that investment in this sector left some negative impacts on Pakistan's economy.

The bureaucracy in Pakistan is a classic example of Max Weber's observation Atiq⁸⁶ highlights colonial bureaucratic system as another potential risk in Pakistan and claims that in Pakistan bureaucracy grew stronger due to negligence of political class which

83 Hussain I, 'Pakistan & Afghanistan: Domestic Pressure and Regional Threats: The Role of Politics in Pakistan's Economy' (2009) 63(1) Journal of International Affairs 1

84Ashfaq H Khan and Yun-Hwan Kim, 'Foreign Direct Investment in Pakistan: Policy, Issues and Operational Implications' (Economic and Development Resource Centre (EDRC) Report Series No. 66, Asian Development Bank July 1999).

85 Julia M Fraser, 'Lessons from the Independent Private Power Experience in Pakistan: The Energy and Mining Sector Board' (Paper No.14, The Energy and Mining Sector Board, World Bank Discussion 2005) <<http://info.worldbank.org/etools/docs/library/240338/Lessons%20from%20the%20Independent%20Private%20Power%20Experience%20in%20Pakistan.pdf> >accessed 13 March 2012: Nuzhat Falki, 'Impact of Foreign Direct Investment on Economic Growth in Pakistan' (2009) 5(5) International Review of Business Research Papers 110 <www.wbiconpro.com/14-Nuzhat.pdf> accessed 13 October 2011.

86 Syed Atiq ul Hassan, 'People, Leaders and the Bureaucracy in Pakistan' (Totse) <http://totse2.com/totse/en/politics/the_world_beyond_the_usa/peopleleadersa191944.htm > accessed 9 September 2012.

provided them vacuum to develop. Niaz⁸⁷ blames bureaucracy for several evils in Pakistan and asserts that, “*Corruption, inefficiency, bloated size, absence of accountability, and resistance to change were portrayed as the manifestations of bureaucracy.*” BOI claims that Pakistan offers perfect location and market to foreign investors. As earlier stated that inconstancy in the policy relates to economic aspect and political decision making of the host State hence is left for future research. However, aforementioned deterring factors such as prevailing and likely risks to FDI in Pakistan have been examined in light of the literature discussed above amongst others.

1.4.7 Literature on Judicial Activism

Black’s Law provides that judicial activism is “*a philosophy of law-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.*”⁸⁸

Literature available on philosophy, origin and historical background of judicial activism suggests that it dates back to *Marbury v Madison*. In this case Chief justice of US Supreme Court John Marshal held that any act of the other branch of government which is contrary to the constitution is void. Dictum laid down in this judgment provides guideline for the countries governed under the written constitution like Pakistan, CJ Marshal held that, “*the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and that courts, as well as other departments, are bound by that instrument.*”⁸⁹

Pakistan has been experiencing unprecedented wave of judicial activism for last about 8-9 years. Expansion in constitutional fundamental rights (“CFR”) and public interest

87 Ilhan Niaz, The Culture of Power and Governance of Pakistan: 1947-2008 () with reference to World Bank report 1983-1993 available at <<http://parameswarier-konhai57.blogspot.co.uk/2010/05/culture-of-power-and-governance-of.html>>.

88 Bryan A. Garner (ed) *Black’s Law Dictionary* (7th ed., West Group, 2004): Andrew P Napolitano, ‘Judges are like umpires’ in *Lies the Government Told You: Myth, Power, and Deception in American History* (Thomas Nelson Inc) 35.

89 *Marbury v Madison* in Kermit L Hall (ed), *The Oxford Guide to United States Supreme Court Decisions* (Oxford University Press) 174.

litigation (“PIL”) has broadened the scope of judicial intervention in almost every matter. Frequent exercise of judicial powers most specifically (“suo moto”)⁹⁰ jurisdiction is seen to be taking over all sorts of matters such as political, social and economic including matters related to foreign direct investment (“FDI”). Exercise of this authority as a routine matter raises serious questions about its constitutionality, effectiveness, desirability as well as sanctity of treaties and agreements executed by the successive governments.

The gap between living standards of poor citizens and elite class is very much prominent. The traditional Pakistani legal system is not capable enough to fill this gap, therefore, PIL helps to fill the gap between poor and elite class in relation to knowledge and power structure. This factor amongst others supports the *gradual shift from the mechanical justice to human welfare justice*.⁹¹

1.5 Gap in the Literature and Contribution

Above discussed literature provides that regardless of the fact that Pakistan is pioneer of the BITs there is scarcity of academic literature on the role and importance of BITs in attraction, promotion and protection of FDI in Pakistan. This scarcity suggests for in depth examination of BITs and role it played to sustain a steady business atmosphere consistent with reasonable expectations of the host State and investors both. Instant study has investigated the provisions contained in the selected BITs, collaborated them with various legal instruments and policies. The study has suggested mechanism to negotiate, draft and execute BITs in the future and salient features of model BIT of Pakistan have also been suggested. Likewise, neither is any academic study available on judicial activism in Pakistan and its constitutionality nor on statutory framework and domestic legal regime related to FDI in Pakistan.

Instant study has investigated the provisions of aforementioned legal instruments and has suggested improvements by finding flaws in their provisions; BITs, judicial activism and domestic legal regime. Therefore, study conducted in this research and its outcomes are

90 Action on court’s own motion under Art 184(3) of constitutional of Islamic Republic of Pakistan 1973.

91 Justice Abdus Sattar Asghar, ‘Public Interest Litigation’ paper presented at International Judicial Conference organised by Pakistan Law Commission at Supreme Court Building Islamabad Pakistan on 12, April 2011.

significant in relation to respecting Pakistan's sovereignty and protection of FDI simultaneously.

1.6 Research Methodology

Webley⁹² indicates that the broader scope of research encompasses every step adopted in the course of research, starting from investigating the facts related to the problem and ending with application of results driven by the investigation. Mostly, research methodologies are divided into three categories, qualitative, quantitative and mixed methods. A qualitative method is employed to find the existence or non-existence of a specific problem or issue in the field of research. It attempts to discover and classify social phenomena and their meanings. According to Krik and Miller, 'Qualitative research fundamentally depends on watching people in their own territory and interacting with them in their own language, on their own terms.'⁹³

In qualitative research, the researcher is normally required to identify appropriate research methods to collect and examine the data to address the research question. Therefore, it is vital to determine whether a single method such as case study, survey, interview or analysis of existing documents will effectively answer the research question or a mix method will address the problem better. The second step is to generate data from the chosen methods. The third step is to decide the techniques to be used for examining and investigating the generated data such as grounded theory,⁹⁴ content,⁹⁵ discourse⁹⁶ or historical analysis. The fourth step is ethical consideration regarding collecting,

92 Webley L, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer H (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010)

93 Peter Cane and Herbert Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

94 Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine 1967).

95 Martin W Bauer, 'Classical Content Analysis: A Review' in Martin W Bauer, George Gaskell and N Allum (eds), *Qualitative Research with Text, Image and Sound: A Practical Handbook* (Sage Publications 2000).

96 Rosalind Gill, 'Discourse Analysis' in Martin W Bauer, George Gaskell and N Allum (eds), *Qualitative Research with Text, Image and Sound: A Practical Handbook* (Sage Publications 2000).

generating and using data which in fact should be in the researcher's mind from the start of the research.

In the context of research in the legal arena, Brownsword⁹⁷ states that legal researchers respond to quick legal changes and quite often speak about some interesting development in the legal context. Usually they put their research in some acceptable form only when they are about to complete their investigation. Brownsword further suggests that, for legal researchers, it is vital to consider and base their research on two important aspects; regulatory effectiveness and regulatory legitimacy, and assess them in the perspective of local, regional and international governance. Following Brownsword's approach, it is crucial for researchers to adopt examine the regulatory effectiveness, legitimacy and existing problem which is the case of the instant research. In instant research the research is going to investigate whether or not problem or issue related to protection of FDI in Pakistan exists or not, if so, he may apply one or more research philosophies on data generated to find the answer.⁹⁸

Considering the fact that instant research largely relates to examination of printed primary and secondary sources such as BITs, statutes, judicial precedents and academic research, it is very unlikely that conducting interviews or using questioner methods to be of much assistance. Moreover, if this method is used than the possible participants would be government officials, investors, arbitrators and Judges. Government officials have their own limitations to disclose the facts, and are likely to be reluctant to accept any wrong practice in the entire process of policy making and its implementation. Similarly investors would never accept any fault and will never disclose any wrong dealing or any corrupt practice for having the provisions of a contract tailored in their favour. State functionaries and investors would all attempt to stretch the entire investigation in their favour; therefore, this method would not be helpful to collect unbiased and reliable data.

97 Roger Brownsword (ed), *What the World Needs Now: Techno Regulation, Human Rights and Human Dignity* (Hart 2004).

98 Dacian C Dragoş, Bogdana Neamţu and Dan Balica, 'The Romanian Ombudsman and its Interaction with the Courts: An Exploratory Research' (2010) 31E Transylvanian Review of Administrative Sciences 58 <www.rtsa.ro/en/files/TRAS-31E-4-DRAGOS,%20NEAMTU,%20BALICA.pdf> accessed 18 July 2012

Similarly, judges who interpret the law and utilise their constitutional powers also have well-established judicial norms which do not allow them to participate or become involved in such activities. If judges participate and disclose views on any specific issue, their past and future decisions relating to that specific issue may be called biased. This is another reason for not utilising questioner and interview methods; hence, utilising the findings of courts, and exploring and interpreting the pieces of legislation, treaties and conventions assist in providing a more in-depth and accurate answer to the research questions, which would not be possible where primary research, was the only form of research.

Following the approach of Brownsword the approach in this work is thus considered to find how a specific problem has arisen or developed. To determine the existing legal problems and effectiveness of the legal instruments a comparative study approach coupled with interpretive approach will be employed. Therefore, research approach adopted for this work mainly focuses on the comparison of the legal issues experiencing the identical legal issues such as judicial activism in Pakistan with judicial activism in USA and India. Likewise, interpretation of various primary and secondary legal sources and instruments and analyses their effectiveness and legitimacy in the context of local, regional and international governance. After comparative examination of the primary sources, the research follows the Black Letter Interpretive research philosophy.⁹⁹ According to Cownie, characteristically, law is examined from the black letter angle by focusing on assessment of legal sources and the reports of judicial decisions as the sole means of understanding the law.¹⁰⁰ According to Brownsword, the black letter method is the ideal instrument for research, being close to the primary source of information such as constitution, pieces of legislation, and judgments of courts.¹⁰¹ Therefore, the primary

99 Dvora Yanow and Peregrine Schwartz-Shea, *Interpretation and Method: Empirical Research Methods and the Interpretive Turn* (Cambridge University Press 1992) 239; Pierre Bourdieu with Dvora Yanow 'Thinking and Doing Social Science in a Humanistic Manner' in Dvora Yanow and Peregrine Schwartz-Shea (eds), *Interpretation and Method: Empirical Research Methods and the Interpretive Turn* (M.E. Sharpe, 2006) 380-393.

100 Fiona Cownie, *Legal Academics: Culture and Identities* (Hart 2005) 31.

101 Roger Brownsword, 'An Introduction to Legal Research' (Report from Wellcome Trust 2006) <www.wellcome.ac.uk/assets/wtx030897.pdf> reproduced at <www.scribd.com/doc/14260230/An-Introduction-to-Legal-Research>.

sources such as BITs, international conventions, policies adopted by successive Pakistani governments, legislation, judicial precedents and secondary sources such as previous academic research in the relevant field are interpreted under this philosophy.

Sources used in this study are comprised of provisions of the constitution of Pakistan, governmental policies, decisions and treaties promulgated by the GOP, and official documents and reports published by GOP and international organisations such as the United Nations, World Bank, ICSID and OECD. These all are original and primary sources of information free from any sort of bias or partiality. These documents have been analysed in the light of judicial precedents and verdicts authored by senior and seasoned judges of higher judiciary and arbitrators of international arbitration tribunals. The judicial precedents go through deep judicial scrutiny by the panels of senior judges in various steps¹⁰² within the hierarchy of the judicial system. The same is true for the verdicts of arbitral tribunals which comprise of a panel of seasoned arbitrators, assisted by renowned and expert lawyers from various jurisdictions. ICSID award as well has scope of probable annulment proceedings though annulment jurisdiction is limited. In these circumstances, the scope of rectification of any error or omission is higher than any inaccuracy. Therefore, any element of bias or unreliability of data generated through this procedure is very unlikely.

Following the comparative research method coupled with interpretive approach, this study has provided descriptive and critical examination on various statutory provisions and investigated exercise of *suo moto* authority by the apex courts of Pakistan. By applying the Black Letter Law interpretive approach, being the ideal research method,¹⁰³ constitutional provisions have been interpreted to find the answers to the problem questions. To identify the will of legislature for enactment of constitutional provisions and to interpret these provisions, Literal, Golden and Mischief⁷ rules have been applied. The Literal rule is considered as the main essence of the judicial precedents. The Literal rule allows the court to use exact literal meanings of the statute; thus judges do not interpret the statute. Judges are not at liberty to create their own meanings by deviating

102 Appeals move from trial courts to High Courts then Supreme Courts, whereas under the English legal system the Court of Appeal comes before the Supreme Court.

103 Brownsword, 'An Introduction to Legal Research' (n 101).

from the literal meaning where the provisions of law are clear and unambiguous. It was held by Lord Diplock that, ‘...it is not then for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences for doing so would be inexpedient, or even unjust or immoral.’¹⁰⁴ The second rule of interpretation employed in this study is the Golden rule. The rule requires adhering to literal and normal meanings unless such meaning leads to any sort of illogicality, repugnancy or discrepancy in relation to other prevailing statutes. The Golden rule allows the court to modify ordinary meanings of any phrase or word to avoid the legal complication; however, the court cannot go further. An example of application of the Golden rule can be seen in *Adler v George*¹⁰⁵ where the court interpreted the word ‘vicinity’ to avoid ambiguity on application of section 3 of the Official Secrets Act 1920 and meaning was extended to avoid any ambiguity regarding application of said law. The most significant tool of interpretation in the hand of the judges is the Mischief rule, which grants judges much discretion to interpret the statute flexibly. The main purpose of this rule is to provide remedy to ‘mischief’ in the statute to correct and construe it fairly. To overcome ambiguity and interpret a questioned statute, judges apply common law and find the best suitable answer to the problem. The Mischief rule was applied for the first time ever in a landmark judgment of English legal history in the *Heydon* case.¹⁰⁶ Nevertheless, the Mischief rule does not give full liberty to judges to interpret the statute to drive the answer which suits to their desires, and is subject to certain principles set out in *Heydon*. To remedy the mischief in the statute, judges are required to assess what was the common law before the enactment of the statute? What is the ambiguity or flaw for which common law does not provide, and the remedy chosen by the legislature to resolve such ambiguity and flaw?¹⁰⁷ This principle reveals that the Mischief rule can only be applied where a statute has been enacted to remedy a flaw in common law and *still* could not rectify the problem. The rules on interpretation of legal instruments literal, golden,

¹⁰⁴ *Duport Steel v Sirs* [1980] HL.

¹⁰⁵ *Adler v George* [1964] 2 QB 7 30 January 1964.

¹⁰⁶ *Heydon* [1584] 76 ER 637: England and Wales High Court (Exchequer Court) Decisions Neutral Citation Number: [1584] EWHC Exch J36 6 ER 637, Pasch 26 Eliz, plea began 20 Eliz Rot 140 <www.bailii.org/ew/cases/EWHC/Exch/1584/J36.html>.

¹⁰⁷ *ibid*.

and mischief have been applied to identified problems and interpret the current statutes in Pakistan.

To support the validity and reliability of this research, it is significant to mention here that, during the course of this investigation the BOI has announced its Investment Policy 2013. The policy provides overt answers to the questions and validates the concerns shown by this researcher regarding the executing BITs without meaningful negotiations. The policy acknowledged that, ‘...the existing BITs have been negotiated over a period of 50 years by various ministries and there are great inconsistencies between them, which create legal uncertainty for both investors and the government...’¹⁰⁸

1.6.2 Statement of ethical consideration

All the sources utilised in instant study are publicly available in printed form and online in official sites of reputed organisations and State departments such BOI, SCP, SBP, UN, ICSID, OECD, WB, IMF etc. Moreover, no individual has been interviewed or served with questionnaire therefore, there are no ethical considerations related to the need to preserve the anonymity of individuals or the privacy of data.

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108 ‘Chapter 3 Investment Protection S 3.1.3’ in *Investment Policy 2013* (BOI 2013) <www.sbi.gos.pk/pdf/SEZA/INVESTMENT%20POLICY-2013.pdf> accessed 14 June 2014.

CHAPTER 2: STATE RESPONSIBILITY TO PROTECT PRIVATE PROPERTY

2.1 Introduction

First chapter has provided an overview of the instant study, its significance and importance of the FDI. It was discussed that FDI plays a significant role for the host economy in order to transfer capital, skills, technology administrative skills and management available from all over the world. Therefore, due to its significance with regard to the host State, the protection of foreign investment in an alien economy and the host State's responsibility to protect private property has much relevance in the era of global trade.

This chapter carries the theoretical discussion about the State's responsibility to protect private property, the way this has developed and on significant theories. The laws related to absolute immunity of sovereign States, restricted immunity of the State, emergence and development of the BIT regime, development of BITs and the State's responsibility and treaty arbitration under Washington Convention are investigated. Some other important doctrines covering key aspects of State sovereignty such as, the Hull Formula and the Calvo Doctrine/Exhausting local remedy first are also discussed in the light of emerging case laws.

2.2 State Responsibility to Protect Private Property

Intercontinental law recognizes that Sovereign States have the right to take hold of the assets of any organisation or individual. Considering the sovereign powers of the State customary international law did not obligate the expropriating State on an expropriation done in non-discriminatory manner and for the public purpose.

Therefore, policies or legislation addressing public concerns, protecting interests of the citizens or in the State's interest were probably not intended to be restricted by the requirements of investment agreements. However, it is vital to determine whether a policy was approved in the public interest or has camouflaged ill designs behind so called public interest.¹ The older investment treaties lacked explanation of the public and State's concerns, comprehensive definition of investment and the intention or objective of the

¹ Angelica Bonfanti, 'Indirect Expropriation under International Investment Law' (2012/2013 Corso di Laurea Magistrale in Giurisprudenza, Milan University).

investment. Nevertheless, modern investment treaties attempted to address these issues by including environmental, safety, health, and other important issues.

The manner in which sovereign countries control their social order has been improved by globalization. The significance of globalization has witnessed numerous global pacts which seem to be shifting the decision making process from the domestic level to international level.

A significant number of these treaties provide added protection to FDI by means of providing direct recourse to international arbitral tribunals to claim compensation against the expropriating State. The right to directly escalate the dispute to international forums together with standards of fair and equitable treatment followed by right of compensation in the event of indirect compensation has changed the world's thinking about the obligations of the host State to protect private property rights.² An essential subdivision of such treaties is a sovereign's responsibility to protect assets and investment of a foreign national whilst investing in an alien host economy. This gave rise to modern investment treaties whereby a sovereign State agrees to surrender its sovereignty and submit to international jurisdictions with regard to investment claims of foreign investors. States agree to universal investment treaties which permanently consist of arbitration clauses for dispute resolution, the level and scope of arbitrations behaviour to disputes as per these investment treaties have developed exponentially.³

In the context of foreign investors, these arbitration clauses attempt to set a credible and satisfactory dispute resolution mechanism allowing the foreign investors the direct recourse to international jurisdictions against the very likely lingering role of the host State's domestic legal system. However, apprehensions also arise with regard to arbitration of investment disputes, their limitation and capability to counter a State's sovereign decision-making authority.⁴ Therefore, it is vital to explore the historical

2 Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation* (Hart, Oxford 2009).

3 Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt Journal of Transnational Law* 776.

4 *International Wrongful Acts and the Legal Reaction*.

development from the internationally recognised doctrine of Sovereign Immunity of a State, its autonomy in law to legislate, make new or alter old policies and decision-making to modern means of State–Investor dispute agreement whereby a sovereign State submits to the jurisdiction of international forums, eg arbitral tribunals.

2.3 Doctrine of Absolute Immunity of the State

It is an established rule of customary international law that one State cannot be sued in the courts of another for acts performed “iure imperii”⁵; the rule is “par in parem non habet imperium.”⁶ The principle is derived from the sovereign nature of exercise of the State’s adjudicative powers and the basic principle of international law that all States are equal. Therefore, the principles of sovereign equality and independence require that no sovereign State should be called or subject to the jurisdiction of the courts or tribunal of another State unless it agrees to submit with its free consent. The significance of the principle is that, it operates to prevent the sovereign acts of a State and its officials from being called into question in proceedings before the courts of another.

The doctrine of State immunity is embodied in the European Convention on State Immunity 1972 which reflects the principles of customary international law. Likewise, the State Immunity Act 1978 of the UK and Common Law affirm the international obligation to recognise the principles of the sovereignty of the State. In *Holland v Lempon Wolf*⁷ the House of Lords (Lord Hope) affirmed that “The immunity is an attribute of the state itself under international law which all other states are obliged by international law to recognize.”

In *Duke of Brunswick v The King of Hanover*⁸ the House of Lords reiterated that, ‘an action cannot be maintained in any English Court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of the nation

5 ‘The imperial, public acts of the government of a State.’

6 ‘equals do not have authority over one another’.

7 *Holland v Lampen-Wolfe*, House of Lords, opinions of The Lords of Appeal for Judgment 20 July [2000] <www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000720/hollan-1.htm>.

8 *Duke of Brunswick v The King of Hanover* (1848) 2 HL Cas 1, (1844) 6 Beav 1, [1848] EngR 794.

of which he is the head; and that no English Court has jurisdiction to entertain any complaints against him in that capacity.’

Following the same dictum it has been held in *de Haber v The Queen of Portugal*⁹ that ‘to cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent.’

The principle is also widely recognised in other jurisdictions; the European Court of Human Rights highlighted the importance of respecting sovereignty of the other State in following words, “The grant of sovereign immunity to a state in a civil proceeding persuade a legitimate aim of complying with international law to promote committee and good relations between states, through the respect of another state’s sovereignty.”¹⁰

The line drawn by the customary international law and the apex courts clearly indicates that the State’s sovereignty represents its independence, which denotes global recognition of its respect and identifies the authority to promulgate and enforce its laws and policies within its territories. Therefore, the sovereignty of a State signifies that it may regulate and promulgate its policies regarding the matters to which it has concerns such as matters of public interest. Instant doctrine therefore advocates for the freedom of the State to fix national protocols related to human rights, environmental safety, State emergencies or affirmative action in order to exercise their independence.¹¹ In the circumstances, to protect human rights, environmental safety, address State emergencies etc. Consequently, the State reserves the right to expropriate individual’s property including foreign participants and shall not be held responsible or liable for its sovereign act. It is important to mention here that it is not necessary that a State will expropriate directly; sometimes, an act of a State may also amount to expropriation. Therefore, expropriations have existence of twofold practices of property deprivation; direct and indirect expropriation. The aspect of direct and indirect expropriation, their impacts and legal consequences with

9 *De Haber v The Queen of Portugal Queen's Bench*. Original Citation: (1851-1852) 17 QB 196: English Reports Citation: 117 E.R. 1255.

10 *Al-Adsani v United Kingdom* 123 I.L.R. 24, 40 para. 54 (Eur. Ct. H.R. [2001]).

11 Choudhury (n 3).

reference of provisions of BITs and case laws will be discussed in detail in chapter 4 “The Bilateral Investment Treaties”

2.4 Doctrine of Restricted Immunity of the State

The growing diplomatic relations between member States of the global village have developed economic ties among themselves necessitating them to share their technology, knowledge and skills with each other. At the same time, foreign investors have recognised unindustrialized nations as a basis of valuable economical earnings and as a source of launching themselves in upcoming important marketplaces. However, worldwide recognized principles of State sovereignty and absolute immunity acts of the State such as direct or indirect expropriation, right to enact new laws or amend existing statutes and policies adversely aggravated significant concern of foreign investors.

The authenticity of contemporary intercontinental conflicts is that foreign nations and their organs, organisations, and nationally owned organisations are frequently involved in transcontinental trade. Normally, their preferred areas of trade include energy, science and technology, mining, utilisation of natural resources, maritime, rail, banking, tourism and air transportation, utilities including water, electricity, industrial manufacturing, natural gas, overseas trade etc. The likelihood of adverse State actions resulting in huge conflict of interest between State and investor required extended protection against any arbitrary act of the host State in the neutral venues.¹² This necessitated that organisations or individuals involved in commercial operations with State entities or in cross-border commercial activities shall have right to challenge the arbitrary acts of the host State. Nevertheless, the possibility to sue a sovereign State in a venue other than the host State was hindered by numerous principles and doctrines; immunity of jurisdictional restriction, restrictions on subjecting sovereign nations to third State jurisdictional,¹³

12 Barnali Choudhury, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’ (2008) 41 Vanderbilt Journal of Transnational Law 776

13 Nation doctrine.

jurisdictional restrictions as code of foreign/diplomatic policy.¹⁴ However, challenging the act of the host State required State's consent and submission to international tribunals which was contrary to the principles of sovereign immunity.

Once it was said by Lord Bingham that, "rule of public policy that has the first claim on the loyalty of the law: that wrongs should be remedied."

Remedying a wrong notwithstanding the State's sovereignty whilst it is involved in commercial activity emerged as doctrine of restrictive immunity of the State. Some western European States and the USA responded by embracing a "restrictive" method to overseas sovereign immunity. The restricted immunity and sovereignty of the State delivered that overseas nations were resistant to legislation linking to their "public acts" but these were not resistant to legislation for their "private acts" comprising marketable happenings. The USA organised the restraining method to nation immunity through the Foreign Sovereign Immunities Act of 1976 ("FSIA"). To more local legislation, exertions were commenced to grow multidimensional treaties controlling foreign sovereign immunity concerns. The European Council approved a "European Convention on State Immunity" and an "Additional Protocol" that came into operation in 1976. Most presently, the United Nations (UN), which for decades has been working on issues related to State immunity, completed its private restraining method for State immunity through the United Nations Convention in relation to legal Immunities of Nations and their Belongings the "UN Convention". The UN Convention was approved on December 2, 2004 by the United Nations General Assembly and the agreement is presently open for initials by 2007. The 2009 Constitution of Belgium if extensively approved, the "UN Convention" may assist as an original intercontinental standard in the arena of the nation's immunity¹⁵

14 Stephan W Schill, 'Enabling Private Or Dering - Function Scope and Effect of Umbrella Clauses in International Investment Treaties' (International Law and Justice Working Papers 2008/9 New York University School of Law).

15 Winston P Nagan and Joshua L Root, 'The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory' (2013) 38(2) North Carolina Journal of International Law 375.

Even if the doctrine finds its roots in common law, the concept of restrictive immunity could not find support in its early days. It remained a long-debated issue among intellectuals and took some time in getting recognition even in some developed societies, eg the UK.

“...Until 1975 England, almost alone of the major trading nations, continued to adhere to a pure, absolute doctrine of state immunity. In the 1970’s, mainly under the influence of Lord Denning M.R., we abandoned that position and adopted the so-called restrictive theory of state immunity under which acts of a commercial nature do not attract state immunity even if done for governmental or political reasons. This development of the common law was confirmed by your Lordships’ House in *I Congreso* in relation to acts committed before the passing of the Act of 1978.”¹⁶

The parliament of the UK recognised and gave effect to the emerging restricted theory by means of the State Immunity Act 1978 (“SIA”). The Act introduced several exceptions to the traditional rule of absolute immunity of the State. Section 1 provides the general rule stating that a State is immune from court/legal proceedings in the UK except stipulated in the statute; actions for defamation, commercial transactions and contacts to be performed in the UK.

Restrictions on the capability of a nation to practice its communal power are predominantly uncertain in the range of investment agreements and treaties. Since 1959, nations have arrived into intercontinental treaties that allow foreign investors to escalate straight actions in international jurisdictions. The principle of restricted immunity enabled foreign investors to seek remedy in international tribunals against the wrongs committed by the sovereigns, such as discriminatory actions, policies, legislation of the host State, as well as violation of investment treaties or agreements.

Protection of foreign investors and their assets seems vital as foreign investment establishes a major source of exterior finance for emerging economies. Considering the

¹⁶ *Holland v Lampen-Wolfe*, House of Lords, opinions of The Lords of Appeal for Judgment 20 July [2000] <http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000720/hollan-2.htm>

significant role of FDI, undeveloped nations are seen to be adopting measures to inspire the foreign investors. Inspirational measures include tax holidays, specially crafted favourable concession agreements, guarantees against direct and indirect expropriation, special treatments, eg fair and equitable treatment, most favoured nation and national treatment etc. To give foreign investors a sense of security and satisfaction, the host State further agrees to submit its sovereignty before international tribunal or courts.

2.5 The Calvo Doctrine and Current Development

In the nineteenth and early twentieth century the protection of foreign investment become uncertain because of disagreement between some Latin American States and the USA and Western European States. The latter had serious concerns about the level of legal protection afforded to foreign investors whereas they had earlier strictly adhered to the doctrine called the “Calvo Doctrine”. The Calvo Doctrine was grounded on the supposition that “aliens and their property should be subject to national treatment”, meaning that aliens should be managed and treated in the identical manner as the domestic investors are treated. Therefore, the entire State-investor relationship was supposed to be governed under domestic legislation and its municipal courts.

The Calvo Doctrine is one of the significant primary doctrines amongst others which attempted to address the State-investor relationship and affairs surrounding the protection of private property rights. Under this framework, the Calvo Doctrine has two obligations which were imposed in relation to aliens’ arrival into an overseas investment arena with a host nation. Firstly, the instant doctrine obligates the foreign investors to compulsorily surrender the diplomatic protection available to them as foreign investors under other international treaties. They are required to exclusively rely on local remedies available under municipal laws of the host nation. Secondly, foreign investors would enjoy rights and privileges similar to the domestic investors meaning that they must not be given more privileges than the nationals of the host country. Additionally, the domestic legislation shall be applicable and domestic courts will have jurisdiction to adjudicate upon the disputes arising from foreign investment.¹⁷

¹⁷ Oyunchimeg Bordukh, ‘Choice of Law in State Contracts in Economic Development Sector - Is There Party Autonomy?’ (PhD thesis, Bond University School of Law, 2008).

The Calvo Doctrine acknowledges the State's right to expropriate without compensation. The doctrine was based on the understanding that foreign investors do not have special treatment over the national investor, hence both national and foreign investors have equal rights. Consequently, if a national investor was subject to expropriation or nationalization without compensation the same is applicable to a foreign national. The Doctrine signifies three fundamental principles: no special treatment for foreign investors, equal rights for national and international investors and the applicable law on foreign investors' rights will be the national law of the host State giving exclusive jurisdiction to domestic courts on foreign investors.

On the other hand, the USA and Western European States resisted the doctrine considering it contradictory to the principles of international law which provide greater protection to foreign investors by setting an "international minimum standard" for protection of foreign investment. They contended that the host States' domestic legal regime was uncertain and offers weaker protection to foreign investors therefore exhausting local remedies ("ELR") was unlikely to bear any fruit for foreign investors.

The Calvo Doctrine was not only a mixture of challenging economic or socio-political efforts in an intercontinental investment development, but instead it was a lawful idea grounded on a minimum of two guidelines in relation to customary international legislation. The doctrine could not attain the status of international law but rationality of the clauses of the doctrine was never completely repudiated during the procedures of jurisdictional decisions.¹⁸ The example of the practice of this doctrine includes recognition of ELR in international forums under certain conditions unless clearly waived

18 *ibid*

in an investment agreement or in a bilateral treaty. These conditions include denial of justice,¹⁹ finality of a judicial act,²⁰ clear treaty violation²¹ or obligation.²²

Reacting to the arbitral tribunal's decision in *Loewen v United States*, *Generation Ukraine, Inc. v Ukraine* and *Waste Management, Inc. v United Mexican States*,²³ asserts that the *Loewen* decision reinstated ELR under the excuse of judicial finality rule and also disregarded the clear provisions of the North American Free Trade Agreement ("NAFTA") and ICSID convention. Reacting to the abovementioned decisions, Schreuer called them 'Calvo's grandchildren.'²⁴ He asserted that such judgments seem very close to reinstating the exhausting of the local remedy principle in international arbitration. If principally foreign investors are obligated to follow ELR no one could stop moving one step further to exhaust local remedy as a rule. Disguising the ELR under judicial finality, distinguishing contractual and treaty violation under the paradigm of FET etc will deprive foreign investors from relying on multiple causes of actions in their claim as well as will revert investment treaty jurisprudence to the Calvo Doctrine.

2.6 Hull Formula

A host State cannot be refrained always from nationalizing assets of investors, especially foreign nationals. It is a recognised right of the sovereign State under customary international law that it can expropriate private assets at any time. The right to expropriate

19 *Loewen v United States* ICSID Case No. ARB(AF)/98/3 Award dated 26/6/2003 <www.italaw.com/sites/default/files/case-documents/ita0470.pdf>.

20 *ibid* paras 163-164, 168, 217.

21 *Generation Ukraine, Inc. v Ukraine* ICSID CASE No. ARB/00/9 16 September 2003 paras 20-30 <www.italaw.com/sites/default/files/case-documents/ita0358.pdf>.

22 *Waste Management, Inc. v United Mexican State* ICSID Case No ARB(AF)/00/3 April 30, 2004 para 116 <www.state.gov/documents/organization/34643.pdf>.

23 Mavluda Sattorova, 'Denial of justice disguised? Investment arbitration and the protection of foreign investors from judicial misconduct' part IV *Loewen v United States*: Reinstating the Local Remedies Rule in Denial Of Justice Claims' (2012) *International & Comparative Law Quarterly*.

24 Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 *The Law and Practice of International Courts and Tribunals* 1 <www.univie.ac.at/intlaw/pdf/cspubl_75.pdf>.

is also largely recognised in the foreign investment law/treaties and BITs subject to certain conditions; expropriation is for public purpose, without any discrimination, followed by adequate compensation and with due process of law.²⁵

An admirable number of existing BITs are using a developed approach of Hull formula entailing that expropriation should be followed by compensation which must be ‘prompt, adequate and effective’. Marvin explains these phrases as “Prompt denotes that compensation be, at the very least, ‘speedy’ (if not immediate), ‘adequate’ means that the property be given an appropriate valuation which comes ‘close to its full or fair market value, and ‘effective’ describes a payment method that is usable and negotiable.”²⁶

The Hull formula requires that the host State shall refrain from expropriation without due process of law, if it expropriates then it should be for public purpose and followed by prompt and adequate compensation. The maximum obligation on the host State for a legitimate nationalization or expropriation is presence of a state of inevitability or for the public purpose subject to due process of law and followed by an adequate compensation. The obligation of compensation is predominantly essential. Provision of a prompt and adequate compensation which protects foreign investors’ from negative financial impacts of nationalization or expropriation may well address the serious concerns of an alien. Besides, ensuring investors a justifiable compensation will invite investment and guard investing nations from the undesirable concerns of expropriations to its inhabitants.

For the reasons mentioned above the ‘Hull formula’ recommends that: “compensation must be prompt, adequate, and effective”. The word “prompt” here refers to the obligation that compensation observes during its course. The word “effective” here reflects the nature of the compensation, which must be presented in freely convertible currency which permits instant usage of the compensation money. The term “adequate” used in this context refers to the degree of compensation funded, and it is in numerous BITs

25 James Harrison, ‘The Protection of Foreign Investment’ (2010) XVIII Section I reproduced in Marvin Rowe, ‘Expropriation According to the Hull formula’, 24 October 2012.

26 *ibid*

connected to the open market value of the investment before an effective nationalization.²⁷

The formula received backing from capital-exporting/ developed countries; however, the developing countries deemed it against their sovereignty.²⁸ It is important to note that the Calvo Doctrine could not attain the status of customary international law due to opposition from capital-exporting States.²⁹ Similarly, the Hull formula could also not attain the status of customary international law due to huge opposition from developing countries. Nowadays, there is no controversy on the host State's right to expropriate, because customary international law does not preclude the host State's right to expropriate subject to its rules such as taking for public purpose, non-discriminatory manner and with prompt and adequate compensation.³⁰ Similarly, almost every treaty acknowledges the host State's right to expropriate subject to the provision of such treaty. However, concern regarding what constitutes expropriation and level of compensation for expropriated assets still exists. Interpretation of expropriation remained long debated before the arbitration tribunals, especially indirect or creeping expropriation. In this context, the wording of the expropriation provision of a BIT plays a significant role in the treaty arbitration. The phraseology of the expropriation clause highlights the investor's rights and the State's obligation, and guides to determine what constitutes expropriation and what does not.

27 *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements*, 'Volume 2 – Studies, Directorate-General for External Policies of the Union Directorate B' (Policy Department Study European Union EXPO/B/INTA/2014/08-09-10 September 2014 PE 534.979 EN).

28 'The Hull Rule', The Jean Monnet Center for International and Regional Economic Law and Justice <www.jeanmonnetprogram.org/archive/papers/97/97-12-III.html>.

29 Gideon Opaluwa, 'Effective compensation for expropriation of foreign investment' (2011) *Coventry Law Journal*

30 OECD, "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law' (OECD Working Papers on International Investment, 2004/04, OECD Publishing) <<http://dx.doi.org/10.1787/780155872321>>.

In *Tecmed v Mexico*³¹ the tribunal considered that, under normal circumstances expropriation denotes the administrative or legislative acts of the government for forcibly acquiring tangible or intangible assets of private persons. The phrase encompasses a variety of circumstances constituting de facto expropriation, such as transfer of assets to a third party instead of the expropriating State or without awarding such assets to a third party depriving the investor from ownership over their assets.³²

2.7 Washington Convention / ICSID Convention

The proposal contained in the Calvo Doctrine to regulate the compensation for nationalisation or expropriation under domestic law of the host country was gradually taken over by the proposal to govern such aspects of the foreign investment under international law.³³ However, despite the fact that cross-border economic activities had significantly increased, a cohesive international legal framework was missing which could govern issues surrounding foreign investment. The main barrier was the enthusiasm of the capital-exporting States to protect their investors and nationals on one hand and on the other underdeveloped countries' desire to attract foreign investment without compromising their regulatory sovereignty. Besides, the General Assembly of the United Nations recognised the sovereign rights of the nations over their natural resources through a unanimous Resolution on Permanent Sovereignty over Natural Resources.³⁴ The resolution contained a number of provisions regarding State sovereignty and autonomy. This appeared to be somehow frightening and undesirable for foreign investors, hence damaging for promotion of foreign investment.

Consequently, the relationship between various stakeholders of a foreign investment e.g. underdeveloped State largely recognised as the investment-importing State, foreign investors, multinational corporations and their home States known as the investment-

31 *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2 Award Dated: 29 May 2003 <www.italaw.com/sites/default/files/case-documents/ita0854.pdf>

32 *ibid* paras 113-114.

33 Andreas F Lowenfeld, 'The ICSID Convention: Origins and Transformation' () 38(47) GA. J. INT'L & COMP. L 47.

34 General Assembly Resolution 1803 (XVII), U.N. Doc. A/5217/Supp. No. 17 (Dec. 14, 1962).

exporting counterpart needed an international mechanism to deal with various aspects of State-investor issues. In the absence of such mechanism BITs served as the primary legal source to describe the State-investor relationship regarding foreign investment. Significance of BITs in this regard has already been discussed above and is also discussed in the separate chapter on BITs. These BITs bestow the rights to foreign investors to recourse to international arbitration under the auspices of the International Centre of Investment Dispute (“ICSID”).

The ICSID is an institution established by the World Bank in 1966 to facilitate treaty arbitration to settle the disputes arising from foreign investment. It is an autonomous international organisation having mandate to facilitate conciliation and treaty arbitration related to foreign investment disputes according to ICSID rules.³⁵ Instant Convention grants straight entrance to private investors in an international arbitral forum. The member States whilst recognising the ICSID Convention have consented and agreed to enforce the arbitral award rendered by ICSID tribunals under said convention. The ICSID rules guarantee to investors that denial by the State to join the proceedings after its consent to ICSID arbitration cannot distress the ICSID arbitral process. In *Impregilo S.p.A v Islamic Republic of Pakistan*³⁶, the tribunal interpreted the phrase ‘consent’ under the convention and held that consent of Pakistan to a national of one State does not extend this right to the national of another State. The Convention also clearly prevents the investor's State from using a diplomatic shield or filling an international claim except that the host State fails to perform with the award made in the dispute.³⁷ Suspension of the right of diplomatic shield is a method in which the ICSID structure contributes to the depoliticisation of investment disputes.

The ICSID provides flexible regulations for arbitration; most of the rules concerning the appointment and number of arbitrators only apply on the failure of the parties to agree on

35 Res. No. AC(17)/RES/55 of ICSID’s Administrative Council (on the election of the Secretary-General) and Report and Financial Statements of the Centre for the years ended June 30, 1984 and 1983, reprinted in ‘ICSID, 1984 Annual Report’ 20-23 (ICSID Convention).

36 *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 <www.italaw.com/cases/documents/560#sthash.KkioUO8e.dpuf>.

37 Article 27 of The ICSID Convention

this point. The ICSID rules assure that parties cannot frustrate the arbitral proceedings; hence in the event of disagreement on appointment of arbitrator, the President of the World Bank being chairman can appoint the tribunal. The ICSID Convention provides an efficient mechanism granting freedom to the parties to use the ICSID mechanism and assures that no party unilaterally can revoke its consent once submitted to the ICSID. Consequently, said assent will be considered to be exclusive of any other available remedy except parties agreed otherwise. The ICSID Convention also guarantees the efficacy of an ICSID arbitral award once it is issued.³⁸

Article 25(1) of the ICSID Convention specifies that jurisdiction of ICSID arbitration tribunals depends upon the existence of a dispute “arising directly out of an investment”.³⁹ The prerequisites to invoke the jurisdiction of ICSID are, “Legal Dispute” arising directly out of an “Investment”, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a “National” of another Contracting State, parties to the dispute “Consent” in writing to submit to the ICSID. In *Malaysian Salvors v Malaysia*⁴⁰, the tribunal was of the opinion that to meet the criteria as an investment the activity should, inter alia, “promote some form of positive economic development for the host State”. Following the same pattern in *Patrick v Congo*⁴¹ the ad-hoc committee discussed the basic requirement under Art 25(1) and identified four characteristics of Investment and held that among them the “essential” requirement that investments contribute, in some fashion, to the economic development of the host State. It was held that a contribution to economic development

38 Article 53(1) of the Convention provides that such an award is binding on the parties while Article 54(2) provides that a party may obtain recognition and enforcement of the award by simply furnishing a certified copy to the competent court or other authority designated for the purpose by each Contracting State.

39 Article 25 (1) “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State...”.

40 *Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia*, ICSID Case No. ARB/05/10 - See more at <www.italaw.com/cases/646#sthash.rBHq7t4D.dpuf>.

41 *Patrick Mitchell v the Democratic Republic of Congo*, ICSID Case No. ARB/99/7 Annulment Proceedings Regarding the Award Rendered on February 9, 2004 Date of Dispatch to the Parties: November 1, 2006 paras 27, 30 & 31. <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf>: <www.italaw.com/sites/default/files/case-documents/ita0537.pdf>.

is an essential characteristic of those investments eligible to fall under the jurisdiction of the ICSID's investor-State arbitration process.

The ICSID Convention is deemed to be most successful Convention related to the settlement of foreign investment disputes. As of 30th June 2012 since its inception 390 investment disputes were registered out of which 62% have been resolved, whereas the remaining 38% either have been settled or discontinued. However, some divergent decisions of the arbitral tribunals on similar issues highlight an inconsistent approach of the arbitral tribunals and have increased unpredictability of the outcome of disputes. These cases include *SGS v Pakistan*⁴² whereby the tribunal rejected the contention of SGS that Pakistan has violated SGS's treaty rights and act and omission of the GOP are tantamount to breach of treaty obligations. Contrary to this, in *SGS v Philippines*⁴³ the tribunal dealt with a similar issue as discussed above, but reached a different conclusion. In the instant case, the SGS attempted recourse to the ICSID arbitration asserting violation of its treaty and contractual rights, simultaneously. Distinct to the decision in *SGS v Pakistan*, the tribunal in *Philippines* held that it had jurisdiction equally upon SGS's treaty claims and its contract claims.⁴⁴ In *BIVAC BV v The Republic of Paraguay*⁴⁵ ICSID tribunal held that it has jurisdiction over the claim under the umbrella clause but declared the claim as inadmissible.

The situation may not give any comfort to the disputant parties, hence it requires improvements in the ICSID mechanism to make the outcomes more predictable and consistent. Despite the need to improve the ICSID regime in various aspects it would be correct to suggest that the amalgamation of ICSID and BITs have undoubtedly worked to encourage FDI. The consolidation has filled the gaps in international law to protect

42 *Société Général de Surveillance S.A. v Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, ICSID [2003] Case No. ARB/01/13 para 35 <www.worldbank.org/icsid/cases/SGS-decision.pdf>.

43 *Société Générale de Surveillance S.A. v Republic of the Philippines* ICSID Case No. ARB/02/6 Decision on Jurisdiction Dated: 29 January 2004 <www.italaw.com/sites/default/files/case-documents/ita0782.pdf>.

44 *ibid.*

45 *Bureau Veritas, Inspection, Valuation, Assessment and Control, Bivac B.V. v The Republic of Paraguay*, Case No. ARB/07/9 ICSID.

property and assets of the foreign investors in third countries, and it has contributed to the progress of customary international law addressing FDI.

2.8 Emergence of Bilateral Investment Treaty Regime

Protection of FDI has been addressed mainly in three instruments: bilateral or multilateral treaties, agreements between host State and investor, and foreign investment laws of the host State. These instruments provide certain assurances to foreign investors, violation of which could be considered as breach of such instrument and may result in legal proceedings.

An instrument which deals with the reciprocal relationship of two States regarding investment is called a BIT.⁴⁶ By assuring special handling and added protection including possibility for investors to bring arbitration proceedings directly against a host State in the event of an alleged breach of treaty, BITs have proven, to date, to be the best legal instrument to build the confidence of foreign investors in the host economy.⁴⁷ Recognition of the BIT regime as one of the best mechanisms can be witnessed from its massive growth from 300 in 1988 to 2,392 by the end of 2004⁴⁸ and 2,860 by the June 2013.⁴⁹ BITs play a considerable role in improving the confidence and trust level of foreign investors in the host economy by offering a pre-defined and more protectionist regime to the investors of signatory States⁵⁰ than international law ever has. Seeing the significance of role the BITs play in protection of FDI, the BITs and surrounding issues are examined in chapter 4 separately.

2.10 Conclusion

46 United Nations Conference on Trade and Development XI (17 August 2004) <[www.unctadxi.org/templates/Page 1006](http://www.unctadxi.org/templates/Page_1006)>.

47 Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law* (2006) 37() International Law and Politics 953.

48 'World Investment Report 2007: Transnational Corporations, Extractive Industries' (United Nations Conference on Trade and Development, 5th ed, United Nations 2007).

49 'International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal' (UNCTAD No.4 June 2013) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf>.

50 United Nations Conference on Trade and Development XI (n 46).

Study conducted in this chapter has revealed that, since very beginning of international trade/investment customary international law recognises sovereign States' right to seize/expropriate private assets. In the beginning this right was absolute and was not subject to any liability upon the expropriating State. According to absolute immunity, States were absolutely sovereign to make any decision, for instance gaining private property, asset expropriation, and could promulgate or alter any regulation or policy having negative impacts on private property at any time. The owners of the assets did not have any right or remedy to resist such decision on any ground whatsoever. The State entities such as president, central bank, chief executives have complete immunity for their sovereign acts affecting private property rights. However, seeing the importance of FDI for the host State and the involvement of sovereigns in the commercial arena it was a need of the time to urge nations to obligate the host States to respect private property right of individuals and organisations, and hence provide it legal protection. In this regard customary international law developed gradually and States enjoying absolute immunity started moving towards restricted immunity. The principles of restricted immunity required the sovereign States to submit to international jurisdictions whilst involved in commercial activities to settle their disputes with investors. It is important to reiterate that the host State's right to expropriate private assets has largely been recognised in all formulas, doctrines and multilateral and bilateral treaties. Yet, the right to expropriate is not absolute now and is subject to certain conditions, eg due process of law, for public purpose followed by prompt and adequate compensation. The emergence of BIT jurisprudence which further attains support and recognition from the ICSID Convention represents the serious approach of the world towards the importance of protection of private property rights, especially in the third country.

It will be correct to conclude that protection of FDI/private property right has significantly developed in the last few decades, especially the ICSID Convention and BIT regime which are seen to be large and most successful players in encouraging and protecting FDI. However, despite the above discussed positive efforts, the States and investors are struggling to get maximum positive outcome of said developments. The question of protection of FDI in an alien economy and protecting the sovereignty and interests of the host State simultaneously is still hotly debated among intellectuals, States and investors. A bundle of problems and issues surround the State-investor relationship, which include divergent approach of arbitral tribunals on identical issues, problems of

the modern era such as terrorism and insurgency, political instability, statutory and regulatory expropriation, difficulty in enforcing arbitral awards against the expropriating States and some serious concerns of underdeveloped countries regarding their sovereignty and the dictatorial role of developed countries. Consequently, for promotion and protection of FDI, the host States, capital-exporting States and their investors are required to adopt a more positive, sincere and serious approach so that all stakeholders can derive maximum benefits and comfort out of FDI as they own common interest and interweaved benefits.

CHAPTER 3: FDI IN PAKISTAN: A THEORETICAL DISCUSSION ON BENEFITS FOR PAKISTAN, REASONS TO INVEST AND DETERRENTS

3.1 Introduction

Previous chapter provided in-depth theoretical study on State's responsibility to protect private property and assets of the investors its background and historical and contemporary development. This chapter is going to examine theories related to attraction of the Foreign Direct Investment (FDI) and examine the aspects which motivate the foreign investors to invest in an alien economy. It will be further examined that if a host State is inclined to trade their sovereignty for attraction of the FDI what are likely benefits it could drive from participation of foreign investors in its economy. The chapter argues that the basic aim behind investment is capital appreciation by earning profit and the likelihood of earning a good profit motivates investors to invest their capital in foreign economies. FDI has been considered an important economic activity and a type of secure external finance. The chapter provides theoretical investigation and discussion on several theories on attraction of FDI such as perfect market theory, perfect location theory. It examines the possible application of these theories on Pakistan in the light of assertion of the Board of Investment of Pakistan "BOI" and finds the answers of the questions; Whether or not Pakistan is an attractive place for FDI? whether or not the economic outlook of Pakistan provides attractive features and sectors to motivate foreign investors' decisions to invest in Pakistan? Since there are many advantages and deterrents for investors to invest in the host economy hence instant chapter examines several types of risks associated with FDI that may discourages the investors to invest in Pakistan. The discouraging aspects examined in this chapter include currency and inflation risk, internal insurgency and wars on terror.

3.2 Benefits of FDI for the Host Economy

3.2.1 Theoretical discussion on benefits of FDI

Scholars are divided on the issue of whether FDI is beneficial to the host economy or not. Some scholars¹ believe FDI is important as it helps in the development and growth of the

1 Sanjaya Lall, 'Vertical inter firm linkages in LDCs: an empirical study' (1980) 42(3) Oxford Bulletin of Economics and Statistics 203; Michael Klein, Carl Aaron, and Bitu Hadjimichael, 'Foreign direct investment and poverty reduction' (Policy Research Working Paper No 2613, World Bank 2001); David W Loree and Stephen E Guisinger, 'Policy and nonpolicy determinants of US equity foreign direct investment' (1995) 26(2) Journal of International Business Studies

economy. Salisu² and Moran³ argue that, FDI plays a considerable role in the development of the host country, by improving its economy and growing the income level of its citizen.⁴ FDI also introduces new technology and trends in the host country which lead to growth in living standards and reduction of poverty levels.⁵ Yussof and Ismail⁶ are of the view that, apart from other advantages, FDI also creates an environment of competition with domestic/local investors which enhances the quality of products and services. It reduces prices by challenging monopolies and leads towards a competitive environment for better job opportunities by providing novel skills and training to the workforce. According to Brooks and Fan,⁷ FDI demonstrated itself as a source of introduction of latest technology, facilities and progress in developing countries.

281; Linda S Goldberg and Michael Klein, 'Foreign Direct Investment, Trade and Real Exchange Rate Linkages in Developing Countries' in Reuven Glick (ed), *Managing Capital Flows and Exchange Rates: Perspectives from the Pacific Basin* (Cambridge University Press 1998) 73; Beata S Javorcik and Mariana Spatareanu, 'To Share or Not To Share: Does Local Participation Matter for Spillovers from Foreign Direct Investment?' (Working Paper 2006-001, Rutgers University Newark 2006) <<http://ideas.repec.org/p/run/wpaper/2006-001.html>> accessed 19 August 2011.

2 Vudayagi N Balasubramanyam, M Salisu and David Sapsford, 'Foreign Direct Investment as an Engine of Growth.' (1999) 8(1) *Journal of International Trade and Economic Development* 27.

3 Theodore H Moran, 'FDI and Development: What Is the Role of International Rules and Regulations?' (August 2003) 12(2) *Transnational Corporations*, United Nations Conference on Trade and Development, Division on Investment, Technology and Enterprise Development 1

4 *ibid*

5 Balasubramanyam, Salisu and Sapsford (n 2).

6 Ishak Yussof and Rahmah Ismail, 'Human Resource Competitiveness and Inflow of Foreign Direct Investment to the ASEAN Region' (June 2002) 9(1) *Asia-Pacific Development Journal* 89.

7 Douglas H Brooks, Emma Xiaoqin Fan, 'Foreign Direct Investment In Developing Asia: Trends, Effects, And Likely Issues For The Forthcoming WTO Negotiations.' (ERD Working Paper No. 38 April 2003).

Contrary to this, other scholars⁸ like bin Atan⁹ and Dunning and Blomstrom¹⁰ have criticised FDI as being risky and destructive for the domestic economy, only helpful to a very small part of the financial market and damaging to domestic investment. Critics of FDI believe and claim that FDI is unable to play a leading role in expansion of the whole economy and contributes in only a very small area of the economy.¹¹ This claim seems not implausible, hence it is necessary to see whether FDI is advantageous in every sector of a host of economy or not. Khan,¹² Fraser¹³ and Falki¹⁴ also have the same view and assert that FDI adds in certain areas of the economy, but contains risks of destabilizing the economy of the host developing country. According to Ortino intensifying economic cooperation between the signatory States of modern international investment treaties (“IIAs”) and increasing their prosperity by attracting foreign capital are some key driving factors behind execution of IIAs and BITs. He considers the object and purpose of BITs and IIAs as an important factor which is largely acknowledged by investment treaty

8 Xiaolun Sun, ‘Foreign Direct Investment and Economic Development: What Do the States Need to Do?’ (Foreign Investment Advisory Service for the Capacity Development Workshops and Global Forum on Reinventing Government on Globalization, Role of the State and Enabling Environment, United Nations 2002) <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006348.pdf>> accessed 4 January 2012; Ashfaq H Khan, ‘Foreign Direct Investment in Pakistan: Policies and Trends’ (1997) 4 Pakistan Development Review 959 <www.pide.org.pk/pdf/PDR/1997/Volume4/959-985.pdf> accessed 21 November 2011.; Nuzhat Falki, ‘Impact of Foreign Direct Investment on Economic Growth in Pakistan’ (2009) 5(5) International Review of Business Research Papers 110 <www.wbiconpro.com/14-Nuzhat.pdf> accessed 13 October 2011.

9 Ghazali bin Atan, ‘The effects of DFI on trade, balance of payments and growth in developing countries, and appropriate policy approaches to DFI’ (Third World Network, Penang 1996).

10 JH Dunning, B Kogut and M Blomstrom, ‘*Globalization of firms and the competitiveness of nations*’ (Institute of Economic Research, Lund University 1990).

11 See Khan (n 8): Julia M Fraser, ‘Lessons from the Independent Private Power Experience in Pakistan: The Energy and Mining Sector Board’ (Paper No.14, The Energy and Mining Sector Board, World Bank Discussion 2005) <<http://info.worldbank.org/etools/docs/library/240338/Lessons%20from%20the%20Independent%20Private%20Power%20Experience%20in%20Pakistan.pdf>> accessed 13 March 2012: See Falki (n 8).

12 Khan (n 8).

13 Fraser (11).

14 Falki (n 8).

scholars. He emphasises on identifying and distinguishing the object and purpose of the investment treaties and asserts that "...the object and purpose of a BIT cannot merely be the protection of foreign investment, as some tribunals have assumed."¹⁵ He quoted Professor Salacuse, "an investment agreement between a developed and a developing country is founded on a grand bargain: a promise of protection of capital in return for the prospect of more capital in the future." In the context of protection of FDI he examined the first ever BIT between Pakistan and Germany 1959 and its updated version signed in 2009 being an important instruments. He highlighted some of the significant changes/improvements in both the versions in terms of the guarantees to foreign investors such as incorporating fair and equitable treatment ("FET") clause and dispute settlement clause. Despite observing some improvements he argues that both BITs appeared to be pretty much similar in terms of their objective, structure and content.

According to Ortino the object and purpose of investment treaties such as Pak-German BIT may be described as: "to ensure the protection of foreign investment(object of the BIT) in order to intensify economic cooperation, encourage/promote international capital flows and increase the prosperity of both contracting parties(purpose of the BIT). Besides, he highlights the growing understanding on considering modern investment instruments as a vital tool to achieve sustainable development of the host State. With regard to concept of development he suggests that it should be considered wider method which covers "economic, social, political and legal considerations."¹⁶

Regardless to difference of opinion on the role of FDI the statistics show that in recent years developing countries enthusiastically attracted a reasonable share of FDI,¹⁷ which

15 Federico Ortino, 'The Investment Treaty System as Judicial Review' King's College London Dickson Poon School of Law Legal studies Research Paper Series, paper no. 2014-23

16 Federico Ortino, 'Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges' E15 Task Force on Investment Policy, Think piece. International Centre for Trade and Sustainable Development (ICTSD) June, 2015

17 Jimmy J Zhan, 'FDI Statistics: A Critical Review and Policy Implications' (Paper prepared for the World Association of Investment Promotion Agencies (WAIPA) Geneva, October 2006) <www.waipa.org/pdf/SurveyResults/Problems_with_FDI_statistics.pdf>.

has proven to have very positive results for growth of their economies.¹⁸ FDI demonstrated itself as a source of introduction of the latest technology, facilities and progress in developing countries.¹⁹ It also creates an environment of competition with domestic/local investors which enhances the quality of products and services and reduces prices by challenging monopoly; similarly, FDI also leads towards a competitive environment for job opportunities by providing latest skills and training to workers.²⁰ Thus, FDI generates new job/ employment opportunities, which helps to reduce poverty and improve living standards of the inhabitants. Since the main concern of this investigation is FDI and Pakistan therefore, study in this chapter examines the role of FDI and other aspects mainly related to Pakistan.

3.2.2 Role of FDI in the development of Pakistan

At the time of its independence in 1947, Pakistan was mainly an agricultural country.²¹ It inherited one of the most deprived parts of South Asia with only one university, one textile mill and one jute mill. Its industrial capability was tiny for processing locally produced agricultural raw materials²². The total area of Pakistan is 796,095.00 sq. km out of which 770,880.0 sq. km is land area.²³ With passage of time Pakistan has proven its potential for growth in the agro and industrial sectors simultaneously. The Board of Investment (“BOI”) and other relevant government departments in Pakistan claim to offer significant FDI policies for attraction of FDI especially tailored to suit foreign investors. BOI asserts that Pakistan has improved its financial market and modernised it, has

18 Jung Wan Lee, Gulzada S Baimukhamedova, Sharzada Akhmetova, ‘The Effects of Foreign Direct Investment On Economic Growth of A Developing Country’ (2009) 12(2) Allied Academies International Conference 22.

19 Douglas H Brooks and Emma Xiaoqin Fan, ‘*Foreign Direct Investment In Developing Asia: Trends, Effects, And Likely Issues For The Forthcoming WTO Negotiations*’ (April 2003) ERD Working Paper No. 38.

20 Ishak Yussof and Rahmah Ismail, ‘Human Resource Competitiveness and Inflow of Foreign Direct Investment to the ASEAN Region’ [June 2002] 9(1) Asia-Pacific Development Journal 89.

21 ‘A Tale of Two States: India and Pakistan’ *Islam Watch* (4 August 2007) <www.islam-watch.org/Others/Tale-of-Two-States-India-Pakistan.htm>.

22 Mushtaq H Khan, ‘*The Political Economy of Industrial Policy in Pakistan 1947-1971*’ (Department of Economics, SOAS, University of London).

23 World Bank, ‘Land area’ () <<http://data.worldbank.org/indicator/AG.LND.TOTL.K2>>.

introduced broad reforms such as development of improved infrastructure in the stock exchange, improved the regulatory environment through the Securities and Exchange Commission of Pakistan (“SECP”), introduced structural reforms in tax tariffs through the Federal Board of Revenue (“FBR”), and strengthened the banking sector through the State Bank of Pakistan (“SBP”). The BOI claims that, due to these reforms a large number of multinational companies have invested in the various sectors. Textile industry is one of the most significant sectors, which has played a considerable role in Pakistan’s economy during the last five decades. Being the fourth largest cotton grower and third largest cotton consumer, this sector has attracted US\$7.5 billion FDI in the last ten years.²⁴ Considering the significant role and contribution of this sector in increasing GDP, the government has announced further incentives²⁵ to attract FDI in the textile sector.

In contrast to its independence in 1947, an agricultural economy has turned into a semi-industrial economy. Now Pakistan is the 27th leading economy in the world in terms of buying capacity; in absolute dollar terms it is the 45th biggest economy.²⁶ The middle class has grown in Pakistan to 35 million.²⁷ Considered by buying capacity, Pakistan has a 30 million-strong middle class,²⁸ that Standard Chartered calculated now earns an average of approximately US\$10,000 a year. Besides, this Pakistan has an emerging higher and upper-middle class, which had been calculated at 6.8 million in 2002 and has grown to 17 million people as of 2010, with comparatively high per capita earnings.²⁹

24 SOURCE

25 Reduction of import duty to 5% on textile machinery and parts and ginning presses, Research and Development (R&D) support of 6%, Turnover tax reduced to 1% and Sales tax reduced to 2%; [SOURCE]; Investment Opportunities: Land is available at Karachi Garment City, Lahore Garment City and Faisalabad Garment City to develop the following industries: Light engineering factories, Textile industries, Garments industries, Ginning factories, Power looms, Carpet industry

26 ‘Barclays sees huge potential in Pakistan’ *Dawn* (14 Aug 2009) <www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/business/09-barclays-sees-huge-potential-in-pakistan---szh-05>.

27 ‘World Bank, UNDP question poverty estimates in Pakistan’ (OneWorld.net) <<http://southasia.oneworld.net/article/view/135153/1/1893/>> accessed 4 May 2008.

28 Ishrat Husain, Ex-Governor, State Bank of Pakistan, 2 December 1999 – 1 December 2005.

29 Research by Standard Chartered Bank (2010).

Some of the world's biggest deposits of natural resources such as gold, copper, coal, and gems provide attractive opportunities to invest in the mining and interrelated sectors. Pakistan has successfully managed to attract good investment in the real estate, telecom and energy sectors in early 2000.³⁰ Foreign companies like Hayat, Emaar and Al Ghurair Giga made huge investments in the real estate and construction sector in landmark ventures such as Centaurs, Platinum Square, Gold Crest and Giga Towers in Islamabad. Large investments have also been made in new property and housing schemes. The hotel industry finally began to see light at the end of the tunnel as projects such as Jumeirah in Islamabad, Sofitel in Karachi and Grand Hyatt Regency in Islamabad were announced. The retail sector also performed well: malls, supermarkets and departmental stores sprang up in various cities of the country. Foreign stores like Metro, Makro and Carrefour announced their entry.³¹ The advertising industry achieved tremendous growth as well in print and electronic media: television, radio, outdoor and internet media – a number of new television and radio channels started their business in the country.

Privatization of telecommunications attracted huge FDI in the telecomms sector: five major companies –Mobilink, Ufone, Telenor, Warid and Zong– are in business with more than 100 million customers, while there were approximately 6.5 million customers for fixed-line telephones, and wireless loop subscription was approximately 2 million. Pakistan earned huge revenue by selling licences for provision of mobile services³² including 3G and 4G services licence.

The banking sector also emerged as a key FDI player by 2008: 80% of banking assets were controlled by the private sector. A number of Middle Eastern and European banks started operations in Pakistan, including Dubai Islamic Bank, Emirates Global Bank,

30 'Why Pakistan; success stories' (BOI) <<http://boi.gov.pk/AboutUs/SuccessStories.aspx>> accessed 21 June 2014.

31 Riaz Haq, 'Housing Construction and Economic Growth in Pakistan' (*Haq's Musings*, 15 December 2009) <www.riazhaq.com/2009/12/housing-construction-and-economic.html>.

32 Aasif Inam, 'Foreign Direct Investment in Pakistan Telecommunication Sector' (Economic Survey 2006-7 Pakistan Telecommunication Authority, July 2007) <www.itu.int/ITU-D/finance/work-cost-tariffs/events/tariff-seminars/Korea-07/presentations/FDI_Aasif_Inam.pdf>.

Barclays, and RBS (ABN Amro takeover).³³ The non-banking financial sector also made immense achievements, eg the net assets of mutual funds increased from PKR25 billion in FY2000 to PKR 313 billion in FY2007. Pakistan's stock market was the fastest growing market in the emerging economies³⁴ between 2000 and 2008. It received massive foreign investment in addition to active contributions by local investors. The Karachi Stock Exchange Market (KSE 100 Index) grew from 1,521 points in June 2000³⁵ to 15,676 points by mid-2008.³⁶

There was immense progress in other areas such as power, construction and real estate markets. To meet its energy requirements, Pakistan mainly relies upon oil, hydro-electric, thermal, coal, nuclear and liquid petroleum gas. In the era of huge energy shortage in Pakistan the Independent Power Plants ("IPPs") like Hub Power Company, Kot Addu Power and Uch Power companies establish by foreign investors are playing a significant role to meet the energy requirements of Pakistan.

Due to financial activity routed through foreign investment the living standards of the population and their buying capacity have also improved. A large number of people obtained leased cars, home loans, personal loans and credit cards. The number of electronic and electric devices sold sky-rocketed which on the whole increased job opportunities, reduced poverty levels and increased individual income.

3.3 Factors which Attract FDI

3.3.1 Theoretical discussion on attraction of FDI

33 'Foreign Investment: Success Stories' (BOI)
<www.pakboi.gov.pk/index.php?option=com_content&view=category&layout=blog&id=910&Itemid=48>.

34 'Capital Markets Chapter 6' (Ministry of Finance Government of Pakistan)
<<http://finance.gov.pk/survey/chapters/06-Capital08.pdf>>.

35 'Overview of Pakistan's economy' (Ministry of Finance Government of Pakistan)
<www.finance.gov.pk/survey/chapters/overview_06_07.pdf>.

36 The Economic Survey of Pakistan 2007-8 Economic Advisory Wing, Ministry of Finance, Government of Pakistan
<<http://watsan.moenv.gov.pk/Documents/Data%20and%20Statistics/6.Pakistan%20Economic%20Survey%20Report,%202009.pdf>>.

There are various theories about attraction of FDI in a foreign economy, highlighting both sides of the coin; the investor and the host State. Examination of these theories and testing them with Pakistan's perspective would assist answering the questions set in this chapter.

Location theory relates flow of FDI with the various aspects of location such as location of the country having access to raw materials and natural resources, opportunities of production near to the resources, cheap labour, labour productivity and cheap hydro-electricity. It also emphasises easy access to vital international markets, availability of and access to domestic and international consumers, accessibility of cheap transportation and shipping etc.³⁷

Location theory relates to the flow of FDI, the primary focus being location, and benefits such as access to vital international markets, and production near to resources, consumers and shipping. It also includes overheads and costs, eg labour and electricity. It also emphasises easy access to vital international markets, availability and access to domestic and international consumers, accessibility of cheap transportation and shipping etc.

Lizondo³⁸ classifies FDI theories into *perfect market theory*, *imperfect market theory* and *theories based on other factors*. Perfect market theory is further divided into three hypotheses, *differential rates of return theory*, market size theory and *portfolio diversification theory*. The theory of differential rates of return provides that investment flows from the market having low return rates to the market having higher rates of return. Market size theory assumes that the investor is influenced by the market size while taking a decision to invest in a particular economy. For this purpose, size of the market is measured by its Gross Domestic Product ("GDP") or by the sales of the Multinational corporations ("MNC"). GDP is used in several studies to explore the link between flow of FDI and GDP, being supportive to the theory that high increase in sales and income of

37 Yuko Kinoshita and Nauro F Campos, 'The Location Determinants of Foreign Direct Investment in Transition Economies' (MDT Project, University of Tokyo July 2002) repub in J Nakagawa (ed), *Managing Development and Transition in a Globalizing World (II): Corporate Behavior* (ISS Research Series No. 13, University of Tokyo 2004) 4<<http://project.iss.u-tokyo.ac.jp/nakagawa/members/papers/3%289%29kinoshita.final.pdf>> accessed 13 September 2012.

38 Lizondo, 'Foreign Direct Investment' (Working Paper WP/90/63 Research Department, International Monetary Fund 1990).

the host country has a direct positive link with attraction of FDI. Portfolio diversification theory is based on two variables that influence the decision of the investor to invest in a particular market: the rate of return and risk.³⁹ According to Moosa,⁴⁰ this theory is comparatively better than differential rate theory, as it offers reasonable justification for cross-border investment and also takes several risks into account which influence the decision of investors, such as policy, political, country risk and currency exchange rate. Portfolio diversification theory provides that the rates of return and risk are two variables which can affect the decision of foreign investors to invest in the host economy offering perfect market and/or perfect location to them. Ibrahim argues that portfolio diversification theory is based on two variables that influence the decision of the investor to invest in a certain market; the rate of return and risk.⁴¹

Following the same track, the US Securities and Exchange Commission (“SEC”) warned foreign investors that they may face a different kind of threat to their investment while investing abroad, which may affect all international investments, eg changes in foreign currency exchange rates, dramatic changes in market value, political, economic and social events, lack of liquidity, less information, reliance on foreign legal remedies, different market operations, nationalism, economic dependence, exploration and production fiscal risks, changing fiscal terms, and contractual provisions. According to the SEC sources, ‘The degree of risk may vary, depending on the type of investment and the market’. The SEC relates the nature and level of threat and risk to FDI with its type and the market where the FDI flows. Similarly, Portfolio Diversification Theory entails taking into account the risk and rate of return to which Moosa agrees.

Khan and Kim⁴² identified some factors which influenced the decisions of foreign investors in various decades. These contributory factors are war, insurgency, devaluation

39 Ibrahim Onour, ‘Unification of Dual Foreign Exchange Markets’ (2000) 33(3) *Economic Change and Restructuring* 171.

40 Imad A Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002) 37.

41 Onour (n 39).

42 Ashfaq H Khan and Yun-Hwan Kim, ‘Foreign Direct Investment in Pakistan: Policy, Issues and Operational Implications’ (Economic and Development Resource Centre (EDRC) Report Series No. 66, Asian Development Bank July 1999); Gladys Lopez-Acevedo and Raymond Robertson, ‘Pakistan’ (World Bank Library)

of currency, political instability, inconsistency in policies and corruption. Aqeel and Nishat⁴³ indicated that adoption of varying policies by GOP to attract FDI in different decades had damaging impacts on inward flow of FDI to Pakistan. Literature available on political instability and FDI indicates that FDI flows towards economies where policy regime is friendly and consistent. Daniel⁴⁴ links the attraction of FDI with the policies of the host country, asserting that, more friendly and protective policy attracts more FDI. Wang and Swain⁴⁵ expand the scope of political instability asserting that, it also includes sudden changes in domestic laws and economic structure in the host country.

It is understandable that one theory would not fit to all. One particular theory may be successful in one economy but at the same time would not work in another economy. Therefore, application of these theories may vary country to country and economy to economy as each and every State and economy has its own advantages and disadvantages.

3.3.2 Application of FDI attraction theories to the Pakistani context

BOI identifies the ideal geographical location of Pakistan as one of ‘five key reasons to invest in Pakistan’, asserting that Pakistan is situated in the heart of Asia and is gateway to the energy-rich central Asian States and financially-liquid Gulf States. Pakistan has a large, cheap, hard-working and experienced workforce, eg engineers, bankers and lawyers. BOI claims Pakistan as investment friendly, offering a perfect market which covers all three perfect market theories to attract FDI. In support of its assertion BOI states that Pakistan was one of the fastest growing economies of the world having reached

<http://elibrary.worldbank.org/doi/abs/10.1596/9780821387788_CH14> accessed 26 January 2014>.

43 Anjum Aqeel and Mohammed Nishat, ‘The Determinants of Foreign Direct Investment in Pakistan’.

44 Daniel Chudnovsky and Andrés López, ‘Globalization and Developing Countries: Foreign Direct Investment and Growth and Sustainable Human Development’ (Occasional Paper, UNCTAD/UNDP Global Programme on Globalization, Liberalization and Sustainable Development March 1999).

45 Zhen Quan Wang and Nigel J Swain, ‘The Determinants of Foreign Direct Investment in Transforming Economies: Evidence from Hungary and China’ (1995) 131(2) *Zeitschrift des Instituts für Weltwirtschaft an der Universität Kiel* 359 <www.econbiz.de/Record/the-determinants-of-foreign-direct-investment-in-transforming-economies-empirical-evidence-from-hungary-and-china-wang-zhen-quan/10001182586> accessed 5 January 2014.

8.4% GDP in 2005, demonstrating the potential of Pakistan's economy to grow and absorb FDI.⁴⁶ Pakistan is a vast country and is enriched with a number of natural resources such as oil, gas, coal, gold, precious stones and minerals etc. across the country.⁴⁷ Pakistan's 180 million population and its US\$1,085 per capita income represents growing middle-class consumers in Pakistan.⁴⁸

Pakistan's population is around 190 million, scattered over the whole country. Pakistan requires improvement and construction of infrastructure such as airports⁴⁹, railways,⁵⁰ highways,⁵¹ ports and shipping,⁵² telecommunication,⁵³ and provision of housing facilities.⁵⁴ FDI can play a long-term, significant role in building and improving these facilities and infrastructures on one hand, and on the other investors can earn long-term and admirable profit.

46 'Five key reasons to invest in Pakistan' (Board of Investment, Government of Pakistan) reason 3 economic outlook <<http://boi.gov.pk/InvestmentGuide/FiveReasons.aspx>>.

47 'Industry: Minerals and Gem Stone Sectors' (Board of Investment, Government of Pakistan) <<http://boi.gov.pk/Sector/Sectors.aspx>> accessed 21 June 2014.

48 Emphasis on perfect market theory, '*Five Key reasons to invest in Pakistan*' (n 46) reason 3 economic outlook.

49 Pakistan requires construction of new airports/upgrading of existing airports, cargo terminals/villages, outsourced operations, facilities and services, etc.

50 For the investment proposal in the railway sector. 'Retail Sector' (Board of Investment, Government of Pakistan) <<http://boi.gov.pk/Sector/SectorDetail.aspx?sid=7>>.

51 Construction of motorways, highways, tunnels and road structures identified for investment, which offer various modes of investment such as Build, Operate & Transfer (BOT), Finance, Manage, Operate & Transfer (FMOT), Operating Concessions (OCs).

52 Construction of cargo villages and industrial parks, container terminals, outsourced operations, facilities and services, Karachi Port Trust (KPT) enclave, miscellaneous supporting infrastructure.

53 For potential, incentives and opportunities of investment in IT and telecommunications. 'IT & Telecom' (Board of Investment, Government of Pakistan) <<http://boi.gov.pk/Sector/SectorDetail.aspx?sid=5>>.

54 Shortfall of 7.9 million houses and required low-cost housing, commercial housing estates, urban development, luxury and low cost hotels, mass transit and urban transport, etc.

Pakistan has been experiencing massive energy crisis since 2007.⁵⁵ Understandably, this extreme power shortage⁵⁶ continuously leaves an adverse impact on economic growth. Recognising this problem, the government declared the power sector its top priority for investment and offered many incentives to investors, motivating them to invest in the power sector. Besides hydro-electric and thermal energy, Pakistan also has a vast capacity to generate solar, wind, coal and biomass energy. The provincial government of Punjab has dedicated 6500 acres in Cholistan desert for investment in Quaid-e-Azam solar park.⁵⁷ Likewise Alternative Energy Development Board of Pakistan (“AEDBP”) estimates the capacity to generate 346,000 MW wind energy in Pakistan⁵⁸. The provincial government of Sindh has also dedicated 20000 acres land for construction of windmill plants and power generation.⁵⁹ Energy generated from coal and biomass is regarded as environmentally friendly because Coal Mine Methane (“CMM”) is like natural gas. The total national coal production from operational coal mines increased by 6.5% from 4.6 million tons in 2005-06 to 4.9 million tons in 2006-07.

55 At present, Pakistan’s total installed generation capacity from Hydroelectric, Thermal, Independent Power Producers (IPPs), and Nuclear sources stands at 19,566 MW. The existing capacity of thermal power generation in Pakistan stands at 12,630 MW, which is almost two-thirds (64.6 percent) of the country’s total generation capacity. Hydro-electric energy is the second largest source of electricity and accounts for 33.1 percent of total power generation in the country. ‘Thur coal, Industry; power & energy’ (Board of Investment, Government of Pakistan) < <http://boi.gov.pk/Sector/SectorDetail.aspx?sid=2> > accessed 8 October 2014.

56 Currently, duration of load-shedding in rural areas of Pakistan is up to 16 to 20 hours and in urban areas 12 to 16 hours (varies summer and winter). See sources: ‘Loadshedding protests continue across Punjab’ *The Express Tribune* with the *International Herald Tribune* (18 June 2012) <<http://tribune.com.pk/story/395393/loadshedding-protests-continue-across-punjab/>> accessed 13 October 2012; Iftikhar Alam, ‘Loadshedding worsens after Shahbaz protest’ *The Nation* (17 June 2012) <www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/17-Jun-2012/loadshedding-worsens-after-shahbaz-protest> accessed 13 October 2012.

57 Quaid-e-Azam Solar Park <www.qasolar.com>.

58 ‘Wind Energy in Pakistan: Resource Potential’ (Alternative Energy Development Board of Pakistan) <www.aedb.org/wind.htm>.

59 ‘Sindh the land of opportunities’ (Board of Investment Sindh) <www.gso.org.tr/userfiles/file/SBI%20Presentation%20for%20Turkey%20Final.pdf>; ‘The Wind Energy’ (The New Park Energy Ltd) <www.newparkenergy.com/index.php/wind-energy/>.

According to BOI⁶⁰ and other surveys⁶¹, the Thar Coalfield (“TC”), with a resource potential of 175 to 182 billion tons of coal, covers an area of 9,000 sq. km in the Tharparkar District in the province of Sind, Pakistan. Discovery of coal in the Thar Desert has opened new doors for long term investment⁶², which is likely to play a major role in the prosperity of Pakistan and could offer long term benefits to investors. Considering the need for FDI in this sector and to eradicate the high cost of imported energy, the government has decided to enhance the share of coal in the overall energy mix, gradually increasing from 5% to 19% by 2030. The Energy Security Action Plan (“ESAP”) set a target of generating 20,000 MW power from coal by 2030 and 50% by 2050. To reduce power shortage and to produce energy from coal, the government has offered massive, admirable incentives to investors by declaring the Thar Coalfield as a Special Economic Zone declared as a Project of National Security. Foreign investors have a golden opportunity to benefit from the current power shortage and huge, attractive incentives which include thirty years exemption on Corporate Tax and Minimum Turnover Tax, withholding tax to shareholder on dividend, procurement of goods and services during project construction, on other levies including special excise duty, federal excise duty and all custom duties on import of coal mining projects allowed at 0%.⁶³

Minerals are valuable natural resources and constitute the vital raw materials for many basic industries; they are a major resource for development. Pakistan is rich with precious

60 ‘Thur coal, Industry; power & energy’ (n 55).

61 Sidra Nisar Malik and Robina Farooq, ‘Pakistan’s energy pathways to 2050 and development of clean coal utilization techniques’ (UK-Pakistan Coal Conference (UKPKCC) University of Leeds, 3-5 July 2012).

62 Thar Coalfield, including associate/attached deposits, coal is equivalent to 185.278 billion tons of oil (more than Iran and Saudi Arabia’s combined oil reserves) or over 2000 TCF of gas (42 times greater than the total gas reserves discovered in Pakistan so far) and generation potential 100,000 MW consuming 536 million tonnes/year. In the Thar Coalfield the total lignite coal reserves are 185 billion tons and Pakistan is 7th richest coal nation in the world. According to research, Thar lignite coal reserves worth 175 billion tons and spread over 9100 sq. km. ‘Thur coal, Industry; power & energy’ (Board of Investment, Government of Pakistan) <<http://boi.gov.pk/Sector/SectorDetail.aspx?sid=2>> accessed 7 November 2011.

63 Zafar Iqbal Zaidi, ‘Pakistan Renewable Energy Report’ (Asian and Pacific Centre for Transfer of Technology (APCTT) of the United Nations, Economic and Social Commission for Asia and the Pacific (ESCAP)) <<http://recap.apctt.org/download.php?p=Admin/Country/Report/10.pdf>> accessed 5 December 2013.

minerals and gemstones; according to BOI Pakistan has millions of tonnes and in some cases billions of tonnes reserves of various precious minerals and gemstones. Opportunities to invest in the oil and gas, and mines and minerals sectors also reveal Pakistan as a perfect market for attraction of FDI. To overcome the shortage of oil and gas, Pakistan announced a new petroleum policy in 2009 and offered more incentives to attract FDI in this sector.⁶⁴

Data provided by BOI draws a beautiful picture of ideal conditions, opportunities and incentives for inward flow of FDI in Pakistan. However, despite low wages, tax incentives and a large number of signed Bilateral Investment Treaties (“BITs”), Pakistan could not manage to attract reasonable FDI, except during 2001-2007. Moreover, most of the FDI it succeeded in attracting is in the non-export oriented sectors and privatised units. The majority of investment has been made in the natural resources and service sectors, eg oil and gas, power, information technology and financial services. Figures demonstrate that in the last decade, these sectors attracted 88% of total FDI out of which 39% was exclusively in the telecom sector; the share of the financial sector was 26.22% and the oil and gas sector attracted 23.35%.⁶⁵ (For details, see appendix 2).

Above discussion reveals that Pakistan is an attractive place for FDI and comprises perfect market and perfect location simultaneously. However, despite its attractive features it could not attract desired amount of FDI in the desired sectors. This failure to attract new FDI and retain existing ones indicates existing of risk related theories thus requires investigating the reasons for such failure. Identifying the problem will be further helpful for Pakistan to despatch negative approaches towards the protection of FDI and attract the desired amount in needed sectors. Therefore, it seems essential to investigate, what according to Pakistan’s economic market, are the major threats to FDI which may affect the decision of foreign investors to invest in Pakistan or retain the existing investments.

64 Ministry of Petroleum and Natural Resources, ‘Petroleum Exploration & Production Policy 2009’ (Ministry of Petroleum and Natural Resources, Government of Pakistan March 2009) <<http://ppisonline.com/iop2010/Downloads/Petroleum-Policy-2009.pdf>> accessed 5 December 2013.

65 Mubarak Zeb Khan, ‘Counterproductive Investment Treaties’ *Dawn InPaper Magazine* (24 May 2012) <<http://dawn.com/author/dawninpapermagazine/>> accessed 5 December 2013.

3.4 Deterrents to FDI

3.4.1 Influential factors and risks to FDI

Policy, political and country risk and currency exchange are a few important, influential factors in cross-border investment decisions. Political instability in the host country discourages FDI. The notion of political instability also includes sudden changes in domestic law/ statutes and economic structures.⁶⁶ According to Wang and Swain, foreign investors prefer to invest in a politically stable and free market system. The taxation policy of the host country is another important factor which influences the foreign investor's decision to invest in such host country; tax holidays and incentives help to attract FDI. *Currency and exchange rate threat* is based on the argument that majority of the foreign investors belong to developed countries and they prefer to invest in under develop countries finding them attractive markets to drive maximum benefit of their investment. The country of origin of the investment largely falls in strong currency zone whereas recipient country belongs to weak currency zone. By comparison, investors from a weak currency zone are less likely to invest in a strong currency zone.

This fact can be verified from the general trend of FDI which flows from countries having a strong currency to countries having a weak currency. Flow of investment from stable currency zone to instable currency zone increases the risks of sudden change in exchange rate hence loss of investment. It also takes into account capital market relationship, foreign exchange risks and the market's preference for holding assets in a strong currency. Many authors confirm⁶⁷ that currency exchange rate and vulnerability of currency largely influence the cross-border investment decision.

It is obvious that in instable currency zone market value of an investment can change at any time; sudden changes in the stock value in one market can affect other markets

⁶⁶ Wang and Swain (n 45).

⁶⁷ Moosa (n 40); International Monetary Fund, 'Foreign Direct Investment in Emerging Market Countries' (Report of the Working Group Capital Markets Consultative Group September 2003) <https://www.imf.org/external/np/cm/cg/2003/eng/091803.pdf> accessed 17 November 2014; 'Shifting Forms of Equity Finance for Developing Countries' Chapter 3 (World Bank) <http://siteresources.worldbank.org/GDFINT/Resources/gdf_chapter3.pdf> accessed 17 November 2014; Jean-Louis Combes, Tidiane Kinda, Patrick Plane, 'Private Capital Flows and the Real Exchange Rate in Developing Countries' CERDI-CNRS, Université d'Auvergne.

immediately because the world economy is interdependent and interlinked. Investors, as well, may have to compete with some further issues, eg nationalism, economic dependence, production fiscal risks, changing fiscal terms, contractual provisions etc which can legally damage the interests of investors.⁶⁸ Moreover, recognition of the sovereign rights of the host State to make changes in their law, policies and regulatory system for developing their resources has enlarged the risks to FDI in an alien country.⁶⁹

The situation discussed above gives rise to policy theory requiring extra guarantees for protection of FDI in developing economies, believing that policies of the host country play a central role in attraction of FDI. In other words, host countries can adopt policies which may inspire foreign investors or they can cut back foreign participation in their economies by adopting negative or less friendly policies. The host country may also introduce a policy to attract FDI in the sectors where it is much required, beneficial or has real importance for the host country. It is correct to say that a more friendly policy catches the fancy of more investors and uncertain and unfriendly policies restrict the flow of FDI towards the host country.

Political stability in the host country is one of the key and essential features to attract FDI.⁷⁰ , , Regardless of its attractive investment policies there is immense likelihood that political disorder of such State could wash away at once even large profitable investments and cause danger to the lives of human resources. However, the factors discussed above may not all necessarily work independently in varying circumstances and countries. A factor successful in one country may be ineffective in another; similarly, due to variant factors one or more features may be applied to a specific economy. *Risk* which combines other causes of attraction of FDI, requires assessing the potential threats, policy approach

68 Evica Petrović and Jelena Stanković, 'Country Risk and Effects of Foreign Direct Investment' (2009) 6(1) Facta Universitatis Series: Economics and Organization 9.

69 Daniel E Vielleville and Baiju Simal Vasani, 'Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?' (April 2008) 5(2) Transnational Dispute Management <www.crowell.com/documents/Sovereignty-Over-Natural-Resources-Versus-Rights-Under-Investment-Contracts_Transnational-Dispute-Management.pdf> accessed 7 May 2011.

70 Multilateral Investment Guarantee Agency, 'MIGA Annual Report 2004' (Multilateral Investment Guarantee Agency, World Bank Group 2004) <www.miga.org/documents/04AnnualReport.pdf> accessed 8 April 2011.

and legal protection available to FDI in Pakistan. Legal protection and policy approach can be measured through examination of statutes, judgments of the Pakistani courts, and international and bilateral treaties to which Pakistan is a party.

3.4.2 Potential threats to FDI in Pakistan

3.4.2.1 Political Instability and Inconsistency in the Governmental Policies

Economic and social factors are correlated with the political stability and consistency of the governmental policies having potential to effect flow of FDI. Investors would not be willing to invest in a country where the monetary essentials are too weak too envisage what the government would do next to support a drooping economy. *Business Monitor International*'s ("BMI") '*Pakistan Country Risk Ratings*' assess the short- and medium-term threats posed by government, 'instability, adverse economic policy-making, weakening in the business atmosphere and external shocks'.⁷¹

Pakistan has a long history of inconsistency in economic policies, for which political instability is the main reason. Want of political stability has been the trademark of Pakistan.⁷² Corruption is seen to be the main cause behind frequent changes in the government. Severe charges of massive corruption left nothing for incoming governments other than changing the policies of previous governments. Incoming governments, were seen to bring massive changes to previous policies and commercial contracts. They ignored the foremost fact that investors have nothing to do with the faces sitting in the government instead they do invest their capital on the motivation and promises made on behalf of State. Circumstantial pressure to generate revenue is another reason for not maintaining consistent policies. The track record of the various previous governments, discussed below, exposes that their economic policies and revenue measures were merely based on an ad hoc-ism and were contrary to an investment-friendly atmosphere. However, unreasonable corporate behaviour of foreign investors to cut favourable deals and tailor suitable terms of contract through unfair means is also seen to be a dominating factor and cannot be ignored.

71 Business Monitor International, 'Pakistan Business Forecast Report' (Business Monitor International July 30 2010) <www.businessmonitor.com/pakistan>.

72 Khan and Kim, 'Foreign Direct Investment in Pakistan' (n 42).

An appraisal of Pakistan's economic policies and political history of last six decades provides that, in the 1950s and 1960s private sector was most important part for industrial investment, and the public sector was limited to the extent of three⁷³ out of 27 basic industries⁷⁴. Resultantly by the late 1960s the economy was mostly dominated by the private sector in main areas. Economic Reforms brought by than Military Dictator Field Marshal Ayub Khan conferred the key role to the private sector. His government decided to restrain foreign investment participation in services sector as it was retained for local investors hence domestic investors had been provided significant opportunities to invest in this sector.

Despite the closure of service sector for foreign participation and 1965's war with India, positive results of Ayub's reforms could be seen by the economic growth in Pakistan. During 1960s average GDP growth reached to 6% annual which was just 3% in the 1950s. Progress in manufacturing sector had also been seen due to huge investment in setting up new industrial establishments, growth in this sector jumped to 9% annual. In 1969 manufactured export of Pakistan was reasonably higher than Thailand. Leaving behind the traditional cultivation methods government introduced green revolution in agriculture sector outcome of which was 4% growth in agro sector. During the Ayub's regime Pakistan emerged as "developmental State" from "Soft State. Ishrat Hussain says, *"Though speculative, it is possible that, had the economic policies and programs of Ayub regime continued over the next two decades, Pakistan would have emerged as another miracle economy."*⁷⁵

⁷³ generation of hydroelectric power, arms and ammunition and manufacturing of railway wagons, telephones, telegraph lines, and wireless apparatus.(Ashfaq 1999)

⁷⁴ iron and steel, heavy engineering, assembly and manufacturing of motor vehicles, assembly and manufacturing of tractors, heavy basic chemicals, petro chemicals, cement, public utilities, gas and oil refineries. (Ashfaq 1999)

⁷⁵ Ishrat Hussain 'Pakistan & Afghanistan: Domestic Pressure and Regional Threats: The Role of Politics in Pakistan's Economy' Journal of International Affairs, School of International and Public Affairs Columbia Vol. 63 No.1 Fall/Winter 2009 Page 1-18

<http://jia.sipa.columbia.edu/role-politics-pakistans-economy-0/aaccessed/on/10/04/2013>

Following the anti-government movement Ayub Khan's regime ended on 25th March 1969. He was succeeded by Army Commander, General Yahya Khan, who had to hand over reign of government to Zulfikar Ali Bhutto on 20th December 1971 after fall of Dhaka⁷⁶ just four days ago on 16th December. In the 1970s to socialise the economy Bhutto government decided to nationalize private industries banks and other financial institutions. This decision set negative impacts on economic growth and discouraged domestic as well as foreign investors.⁷⁷ Bhutto government took over the supervision of ten major categories of industries, seven commercial banks, development financial institutions, and insurance companies. ⁷⁸ Decision to nationalise aforesaid industries derailed the economic growth and progress observed in 1960s; GDP growth rate dropped down to 3.7%, inflation rate reached to 16% during 1971-1977 and growth rate of manufacturing sector dropped to 3%.⁷⁹ Notwithstanding to the negative results of nationalisation the Bhutto government continued with its nationalisation policy with another round of nationalization of small-sized agro processing units in 1975.

Besides, aforesaid nationalised organisations could not come up to expectation of the government. Failure to deliver compelled to the GOP to act flexible towards foreign participation in the economy hence it gradually started acting lenient. As a first step Bhutto government allowed FDI only in the shape of joint equity participation "JEP" with domestic investors in the sectors where novel technology, skills and expertise were required. Satisfactory legal structure for foreign investment was given through the Foreign Private Investment (Promotion and Protection) Act 1976. The Act provided assurance against expropriation and ample compensation for acquisition. It guaranteed the remittance of profit and capital, remittance of appreciation of capital

⁷⁶ Pakistan was comprised of East Pakistan and West Pakistan. After 1971 war between Pakistan and India, Bangladesh emerged as independent State on area called East Pakistan.

⁷⁷ Zeshan Atique, Mohsin Hasnain Ahmad and Usman Azhar, *'The Impact of FDI on Economic Growth under Foreign Trade Regimes: A Case Study of Pakistan'*

http://www.relooney.info/SI_Expeditionary/0-Important_59.pdf

⁷⁸ Economic Reforms Order by Government of Pakistan 1 January (1972)

⁷⁹ Prema-chandra Athukorala, Jayatilleke S. S. Bandara, Saman Kelegama, *'Trade Liberalisation and Poverty in South Asia'* Routledge Publication New York USA 2011

investment, and relief from double taxation for countries with which Pakistan had agreement on evasion of double taxation.

Era of nationalisation had been ended with another army coup in Pakistan on 5th July 1977. Following the civil disorder and opposition parties' movement, then Chief of Army Staff General Zia Ul Haq imposed martial law in Pakistan after the removing Zulfikar Ali Bhutto from the office of Prime Minister of Pakistan. In September 1978 the military government showed its inclination towards the role of private and public sector by following a model of a mixed economy, with the private and public sector strengthening each other.⁸⁰ According to world development indicator inward flow of FDI in Pakistan was \$ 41 million in 1970-74 (Bhutto Regime) and \$138 million 1975-1979 (two years of Bhutto government and two years Zia government)

In early 1980s, in order to encourage and attract FDI Pakistan's military government, assigned a leading role to private sector. The industrial policy statement of 1984 gave the same weight to the public and private sectors and encouraged the private sector to come forward. Study conducted by Ashfaq and Kim on Pakistan's policies and operational issues to attract FDI demonstrates several reforms and their outcome on the economy of Pakistan. To attract the export oriented FDI the GOP set up the Export Promotion Zones "EPZ" and encouraged foreign investors and overseas Pakistanis equally to invest in EPZ however investment made by the overseas Pakistanis was non repatriable. The concessions and services offered by the EPZ integrated duty-free imports and exports of goods and tax holidays. However, the process of privatization was not commenced if said had been started, Pakistan might have fascinated a sizeable amount of FDI in succeeding periods. The public sector occupied key industrial areas, which clearly discouraged the inflow of FDI. Permission of the federal and provincial government was required to establish new industry process of getting industry license and N.O.C was also very restrictive.

Martial law continued for a period of eight years and was lifted in 1986 after non-party elections held in 1985. Muhammad Khan Junejo was sworn in as Prime Minister of Pakistan under the presidentship of the serving Army Chief who later dissolved the Junejo government on 29 May 1988 by exercising the power conferred in Art 58(2)

⁸⁰ Khan, A.H. & Kim, Y.-H., 1999, '*Foreign Direct Investment in Pakistan: Policy Issues and Operational Implications*,' Papers 66, Asian Development Bank

B of the Constitution. After a few months, Zia's plane crashed and a new government took over following general elections held in 1988. In total, Pakistan was governed by five elected governments and four caretaker governments from 29 May 1988 to 12 October 1999 when General Pervez Mushraf took control of the country, declaring himself as chief executive of the country. Such rapid changes in governments accompanied by quick changes in policies and programs did not make for a pleasant experience for foreign investors.

By the end of this decade Pakistan introduced and started implementing a further modest foreign investment policy as an element of its general monetary restructuring program, consequently, an innovative industrial strategy package was introduced in 1989 which was based on the recognition of the advantages of the private sector. A number of strategic and regulatory steps were taken to move forward the business environment in general and attract FDI in particular. Government made its rules flexible for foreign investors and decided to give free hand to foreign participants by applying equivalent rules and policies upon foreign and domestic investors regarding setting up new business and industries. Except some industries⁸¹ government opened the sectors previously banned for foreign participation and lifted all prerequisites of State approval for setting up such industries. Improvements and liberalisations encouraged the foreign investors to invest in Pakistan's economy and in this decade inward flow of FDI had been recorded \$1086 which was far better than \$179 million FDI in 1970s. ⁸²

In the 1990s Pakistan continued with its economic liberalisation policies and looked keener to enhance foreign participation in the Pakistan's economy. In October 1990 Pakistan investment Board ("PIB") was established to assist and create opportunities for FDI and provide investment services. The PIB was renamed as Board of Investment ("BOI") in 1994 and commenced its one window operation to facilitate the foreign investors in setting up new industries, provision of information on the

⁸¹ *arms and ammunition, security printing, currency and mint, high explosives, radioactive substances, and alcoholic beverages (in fact, these industries were also closed to domestic private investors)*(Ashfaq and Kim 1999)

⁸² World Development Indicator of the World Bank
<http://search.worldbank.org/data?qterm=FDI%20in%20Pakistan&language=EN>

investment opportunities and to overcome difficulties and hurdles regarding investment.⁸³ Besides, aiming to continue and protect economic reforms and establish a liberal atmosphere for savings and investment, GOP enacted the Protection of Economic Reforms Act 1992 (“PERA”). The Act has been promulgated to give legal shelter to economic reforms concerning privatization and deregulation and other monetary incentives initiated by the government through various programs, policies and regulations on and after 7th November 1990. Massive fiscal incentives were given to foreign investors including 10 years income tax holiday provided, the plant commences commercial operation as of 30 June 1999.⁸⁴ In November 1997, the government announced the New Investment Policy which included key strategy plans. Government allowed 100% foreign participation in corporate agriculture farming which was 60% previously likewise government allowed 100% FDI in engineering, construction services etc.⁸⁵ However, due to immense political instability Pakistan could not drive desired benefits for its economy despite bringing vital policy changes and admirable steps mentioned above.

In the 1990s, frequent changes in government occurred, from May 1988 to 12th October 1999 five elected and four caretaker governments ruled the country. This era may be called a conflict era between two major political parties of Pakistan; the Pakistan Peoples’ Party (“PPP”) (since 2002, Pakistan Peoples’ Party Parliamentary) and the Pakistan Muslim League (“PML”) (since 1993, Pakistan Muslim League (Nawaz), “PML(N)”. This political intolerance resulted another military takeover on 12th October 1999. Resultantly, with every change in government several examples of deviation in government policies could be witnessed.

⁸³ Composition of Board of Investment of Pakistan

http://www.pakboi.gov.pk/index.php?option=com_content&view=article&id=115:composition-of-the-board-of-investment&catid=915:about-boi&Itemid=132

⁸⁴ *‘Incentives and concessions in SIZs’*, Board of Investment of Pakistan

http://www.pakboi.gov.pk/index.php?option=com_content&view=article&id=142%3Aindustries&catid=51%3Aindustries&Itemid=132

⁸⁵ ‘Pakistan: Trade Policy Regime: Framework and Objectives’ World Trade Organisation Report (2010), Pakistan: review at p. 19 WT/TPR/S/193 www.wto.org/english/tratop_e/tpr_e/s193-02_e.doc

The process of Privatization slowed down significantly, as against the privatization of 63 units in two years⁸⁶ only 20 units were privatized in three years.⁸⁷ In the same way, with the change in Nawz Sharif's government in 1993, a sweeping change was made in the Lahore–Islamabad motorway project when PPP government headed by Prime Minister Benazir Bhutto decided to cut down eight lanes of motorway to six lanes. Considering the reserve crisis said government decided to withdraw the concession of duty-free imports of machinery agreed to the petroleum and power sectors and to enforce 10% regulatory duty in October 1995. Although after several months efforts said concession was restored but government thereafter again imposed regulatory duty in the federal budget 1996-1997.

Similarly, on dismissal of PPP government in 1996 under severe charges of corruption, grave disagreement between the PML (N) government and Independent Power Plants (“IPPs”) had been observed. Disagreement on the electricity purchase tariff by the Water and Power Development Authority (“WAPDA”) from IPPs reached to the extreme level in 1998 which aggravated investors' confidence.⁸⁸ It is pertinent to mention here that IPP's have been brought in Pakistan by previous PPP government by offering massive incentives and huge tariff rate to them. During this decade foreign investors in Pakistan also had to deal with a multifarious legal situation. Law based on different legal systems are applied independently. Uncertainty was intensifying by the exercise of issuing Special Regulatory Orders “SROs” over time many SROs have been issued under a particular law, changing its competence and objective. One more example of slow execution of policies relating to investment activity was that out of 132 Memorandum of Understanding “MOUs” signed during the earlier government, only 39 had made minute progress.

Moreover, once again the inconsistency in the policies has been seen dominating over all the efforts and reforms of GOP. Following the nuclear test on 28 May 1998, the government had to introduce the Foreign Exchange (Temporary Restrictions) Act 1998

⁸⁶ During the PML rule (1991-1992 and 1992-1993)

⁸⁷ During the PPP rule (1993-1994 to 1995-1996)

⁸⁸ *Hubco v Wapda*, Arb. Int'l 439, 456-58 (2000) *reprinted in* Mealey's Int'l Arb. Rep., July 2000, at A-1.

(“FETRA”). By means of FETRA, the government imposed certain temporary restrictions concerning Foreign Exchange (“FE”) and overrode various provisions of PERA 1992. The government restricted Foreign Currency Account holders from withdrawing, transferring or taking out of the country FE without permission of the State Bank of Pakistan. It, nevertheless, permitted the FCA holders to exchange their foreign currency into Pakistani currency at the officially notified exchange rate. Decision to freeze foreign currency account badly affected the flow of FDI to Pakistan. State of uncertainty and prevailing sense of financial insecurity in foreign investors further deteriorated on imposition of financial sanctions against Pakistan by the international organizations⁸⁹ and States.⁹⁰ Financial sanctions lead to grave scarcity of foreign reserves which dropped down to very bottom level. Serious crisis arose over foreign exchange rate, trade deficit and balance of payment which worsen the situation and badly affected the economic growth.

Desiring to surmount financial standoff and restore the confidence of foreign investors, the GOP announced attractive incentives mentioned in preceding paragraphs e.g. tax holidays duty-free imports of plant and machinery not manufactured locally etc. The GOP improvised to get the financial sanctions relaxed⁹¹ and was endeavouring to heal up its economic condition when another military coup threw away the elected government of PML (N) on 12th October 1999. Military coup was a big blow to the business elite which once again jolted the confidence of a community already uncertain about economic future and policies of the GOP.

Nevertheless, to encourage FDI military government tried to restore and improve confidence of foreign investors by initiating affable policies and reforms outcome of which had been seen from commencement of new century. In this decade investment policies have been modified and formulated by the GOP in a suitable manner for foreign investors. The GOPs strategy inclination remained consistent, with liberalization, de-regulation, privatization, and facilitation which developed the economic atmosphere in numerous

⁸⁹ Security Council of United Nations and G-7 in early June 1998

⁹⁰ USA, Japan etc.

⁹¹ Partial waiver from G-7 and resumption of IMF loan in early 1999

angles.⁹² Being its most important foundation the capital markets were updated. Security Exchange Commission of Pakistan (“SECP”) made improvement in the regulatory atmosphere of the stock exchanges, corporate bond market and the leasing sector. The Central Board of Revenue “CBR” (now Federal Board of Revenue “FBR”) helped for structural reforms in tax and tariffs whereas the SBP revived the banking sector into high income on investment. Besides, GOP also executed confidence building measures by enacting new laws. To improve the level of credibility Foreign Currency Accounts (Protection) Ordinance 2001 “FCAO 2001” was promulgated. The Ordinance assured to the foreign investors protection against expropriation. By providing confidence to the FDI government successfully managed to escape from the negative effects of highly up shooting prices of petroleum, furnace and crude oil. Consistency in the policies, political stability and effectively improvising above said crises further helped Pakistan out to survive.

Extensive macroeconomic reforms since 2000, mainly privatizing the banking sector fascinated the foreign investors and helped the economy to grow.⁹³ Banks in Pakistan attracted \$4 billion FDI in the year 2006-7.⁹⁴ Leading international commercial banks also started their business in Pakistan and earned immense profit.⁹⁵ FDI climbed by 180.6% year-on-year. In 2005, the World Bank named Pakistan the top reformer in its region and in the top 10 reformers globally.⁹⁶ Besides discussed features, significance progress of this era was addressing the chronic problem of instability of the currency exchange rate. Stability in currency for almost seven to eight years encouraged the foreign investors and stabilized the balance of payment. The FDI flow in 2000-1 which was \$322.5 million reached to highest

⁹² Poverty Reduction Strategy Paper PRSP) - II ‘ Pillar V: Making Industry Internationally Competitive’ at page 219 Government of Pakistan Finance Division
<http://www.finance.gov.pk/poverty/PRSP-II.pdf> accessed on/23/12/2013

⁹³ www.londonstockexchange.com/NR/rdonlyres/9876F63B-54DB-46FC-B636-DB877A379C1B/0/Privatisationminister.pdf

⁹⁴ ‘Pakistan 10 Years Strategy Paper for the Banking Sector Reforms’ p. 2 the State Bank of Pakistan
<http://www.sbp.org.pk/bsd/10YearStrategyPaper.pdf> accessed on/23/12/2013

⁹⁵ “Efficiency of Financial Intermediation: An Analysis of Banking Spreads” in Financial Stability Review 2006,

State Bank of Pakistan

⁹⁶ "Pakistan Among Top 10 Reformers". September 12, 2005.
<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,contentMDK:20643510~menuPK:158937~pagePK:146736~piPK:146830~theSitePK:223547,00.html>

level \$5410.2 million in 2007-8. Total inflow of FDI from FY 2001-2008 had been recorded \$18149 million.⁹⁷

Despite worldwide financial crisis and war on terror within and across the borders of Pakistan massive inward flow of FDI and financial activities of foreign investors helped Pakistan to remain stable and growing. Improvement in GDP in 2000s up to 8.5% demonstrates the potential of Pakistan's economy to grow further and absorb FDI. This economic growth improved the living standard of people⁹⁸ on one hand whereas on other foreign companies supported the local industry to grow further. By October 2007, Pakistan raised back its Foreign Reserves to \$16.4 billion. Exceptional policies kept Pakistan's trade deficit controlled at \$13 billion, exports boomed to \$18 billion, revenue generation increased to become \$13 billion and attracted foreign investment of \$8.4 billion.⁹⁹ In the first four years of the new millennium, Pakistan's KSE 100 Index was the best performing stock market index in the world as declared by the international magazine "Business Week".¹⁰⁰ The stock market capitalization of listed companies in Pakistan was valued at \$5,937 million in 2005 by the World Bank¹⁰¹. The State Bank of Pakistan "SBP" reported¹⁰² that, FDI year-on-year increased to \$2.224 billion from only \$792.6 million and portfolio investment to \$407.4 million, whereas it was \$108.1 million in the corresponding period last year. According to the statistics released by the SBP¹⁰³

⁹⁷ '7.12 Foreign Direct Investment Flows' Handbook of Statistics on Pakistan Economy p.556 The State Bank of Pakistan http://www.sbp.org.pk/departments/stats/PakEconomy_HandBook/Chap-7.12.pdf

⁹⁸ Prema-chandra Athukorala, Jayatileke S. S. Bandara, Saman Kelegama, 'Trade Liberalisation and Poverty in South Asia' p. 142-3 Routledge Publication New York USA 2011

⁹⁹ <http://www.londonstockexchange.com/NR/rdonlyres/9876F63B-54DB-46FC-B636-DB877A379C1B/0/Privatisationminister>.

¹⁰⁰ Hina Shahzadi and Muhammad Naveed Chohan, 'Impact of Gold Prices on Stock Exchange: A Case Study of Pakistan' <http://saicon2011.ciitlahore.edu.pk/Economics/1038.pdf> /accessed/on/24/12/2013: International Magazine Business Week (Bloomberg Business Week, 2002)

¹⁰¹ The World Bank Report, 'Doing Business in 2006: South Asian Countries Pick up Reform Pace, says World Bank Group; India Ranks 116th, 25 Places After China; Pakistan Among Top 10 Reformers'

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,contentMDK:20643510~menuPK:158937~pagePK:146736~piPK:146830~theSitePK:223547,00.html>/accessed/on/09/01/2014

¹⁰² The State Bank of Pakistan report as of April 24 2006 on flow of FDI during July-March 2005-06

¹⁰³ FDI into Pakistan jumps 180.6% in 1st 9 months of FY06

Pakistan had received almost \$8.4 billion FDI in the financial year 06/07, surpassing the government target of \$4 billion.¹⁰⁴

Following the general election in 2008, PPPP lead civilian government took the reign of the State but serious political disagreement arose between then president of the country and newly elected civilian government. Several days' standoff and rumours of presidential takeover ended with the resignation of President Musharaf, thereafter, parliament and provincial assemblies elected new civilian president and democracy was restored fully. However, with restoration of democracy, Pakistan's political history once again witnessed revival of conflict and tussles between rivals of the 1990s era. Allegation of corruption and grabbing kickbacks from foreign investors were echoing everywhere. It engendered conflict between different stock holders of the State which became worst day by day. Conflict between different organs of the State gave rise to a new phenomenon in Pakistan which is known as judicial activism. Contrary to the past, this time neither any government was removed by the President or by a military dictator nor was any policy reviewed or changed by the successor government. It was apex judiciary of the country who exercised its vast judicial powers to question and annul the acts of the executive and parliament. The Supreme Court of Pakistan ("SCP") reviewed a number of mega commercial deals, investment agreements and annulled them. The SCP found high political and bureaucratic elite involved in corrupt practices and hold them responsible for such illegal deals Besides, the SCP also acted actively in constitutional matters and reacted aggressively on several occasions especially when the government attempted to curtail the powers of the higher judiciary.¹⁰⁵

The judgment of the SCP in the National Reconciliation Ordinance ("NRO") case declaring the ordinance void ab initio, illegal and unconstitutional¹⁰⁶ raised the question of the credibility of then President Asif Ali Zardari and a number of influential ministers of the federal and provincial cabinets. Although President Zardari claimed immunity,

¹⁰⁴ Daily Mail News

¹⁰⁵ The Rek Diq gold and copper mine case, Rental power case and many more have been discussed in chapter 5 under judicial activism

¹⁰⁶ Constitution Petition Nos. 76 to 80 of 2007 & 59/2009, and Civil Appeals No. 1094 of 2009 (On Appeal from the Order Dated 15 January 2009 passed by High Court of Sindh at Karachi in Constitution Petition No. 355 of 2008) and HRC Nos. 14328-P to 14331-P & 15082-P of 2009.

being sovereign authority, it provided another opportunity to his political rivals to raise fingers against him and demand for his and his minsters' accountability under charges of corruption. Consequently another episode of disagreement and tussle between old political rivals was seen to be in place and further weakened decision power and credibility of the government. This political disagreement communicated a negative message to foreign investors having previous bitter experience already discussed above. They seem to have grave concerns about continuity of policies of previous government result of which could be seen from drastic changes of FDI, foreign exchange rate, Stock exchange etc. see appendix 2 & 3. This state of affairs alarmed investors, as political disorder had diverted the government from efforts to improve security and the economy, which perhaps resulted in the flight of FDI from country.¹⁰⁷

Following facts and figures reveal that during this term Pakistan faced huge financial crisis, heavy decline in, stock market index, exchange rate of Pak rupees, and foreign reserves were seen. Foreign reserved decreased to \$5 billion comparing to \$16 billion just a few month ago.¹⁰⁸ Moreover due to huge withdrawal of investment in stock exchange government also had to freeze its stock market to avoid virtual crash. FDI from a height of about \$8 billion has nosedived to \$ 3,719.9 million for the FY2008-9 and \$2,205.7 million for FY 2009-10.¹⁰⁹ Decline in inward flow of FDI was not time being phenomenon it continued to shrink during successive fiscal years in FY 2010-11 it was \$1634.8 million, FY 2011-12 \$ 812.6 million and for the FY 2012-13 inward flow of FDI was \$1447.3 million¹¹⁰. Besides decline in FDI, a comparison of exchange rate of PKR during previous and new government reveals massive decline in its exchange rate. In September 2001-02 exchange rate of PKR

107 Chris Allbritton, 'FACTBOX-Key political risks to watch in Pakistan' *Reuters* (2 August 2010) <<http://uk.reuters.com/article/2010/08/02/risks-pakistan-idUKRISKPK20100802>> accessed 17 November 2013.

108 IMF Approves Pakistan Loan Package". VOA News (Voice of America). 25 November [2008] <http://voanews.com/english/archive/2008-11/2008-11-25-voa26.cfm>

109 7.12 *Foreign Direct Investment Flows* 'Handbook of Statistics on Pakistan Economy' p.556 The State Bank of Pakistan http://www.sbp.org.pk/departments/stats/PakEconomy_HandBook/Chap-7.12.pdf

110 Foreign Investment inflows in Pakistan (\$millions), Board of Investment of Pakistan

http://www.pakboi.gov.pk/index.php?option=com_content&view=article&id=180&Itemid=137 accessed /on/24/12/2013

with US\$ was 64.14 by the end of previous regime exchange rate was 61111 rupees per dollar. However, with the new democratic government PKR again started declining and this trend is still continuing. Like FDI PKR also nosedived during both successive democratic governments, comparing to Rs. 61 per dollar in the November 2007 Pak rupees declined to 80.95 for the FY 2008-9, FY 2009-10 85.28, FY 2011-12 94.11 and by the end of PPP's government in March-April 2013 PKR had declined to 98.31¹¹² and 104.73 average exchange rate recorded in July 2016.¹¹³ To support its financial program and economy government also had to negotiate and sign an agreement with the IMF for borrowing \$7.6 billion at the rate of 3.51-4.51 interest. However despite all these efforts GDP remain between 2.5 to 3% comparing to 8-9% during Musharaf Regime.¹¹⁴

In fact this was not an end of political disagreement because following the general elections in Pakistan on 11th May 2013 PML(N) lead government controlled the reign of the country. However, opposition parties especially newly emerged political party Pakistan Tehreek-e-Insaaf ("PTI") have rejected the election results under severe charges of pre-poll and post-poll rigging in the general elections held on 11th May 2013. A year later they started demonstrations across the country and jammed the affairs of the government in the federal capital. Consequently, visits of the heads of the States and governments of several countries have been cancelled. Most noteworthy cancelled visit was the visit of President of Republic of China in which he had to sign \$42 billion FDI agreements.

3.4.2.2 Currency exchange rate

The currency exchange rate is also seen to be a continuous problem in Pakistan, which cannot be separated from the political instability and inconsistency of economic policies.

111 Statistics and DWH Department Monthly Average Foreign Exchange Rate (Pak Rupees Per US \$) www.exchange-rates.org/history/PKR/USD/Taccessed/on/24/12/2013

112 Statistics and DWH Department Monthly Average Foreign Exchange Rate (Pak Rupees Per US \$) www.exchange-rates.org/history/PKR/USD/Taccessed/on/24/12/2013

113 Monthly Statistical Bulletin, Annual Report of SBP and International Financial Statistics (IFS). State Bank of Pakistan <http://www.sbp.org.pk/>

114 Poverty Reduction Strategy Paper PRSP) - II 'Pillar V: Making Industry Internationally Competitive' (at 1.2.7 p 7) Government of Pakistan Finance Division
Poverty Reduction Strategy Paper PRSP) - II 'Pillar V: Making Industry Internationally Competitive' (at 1.2.7 p 7) Government of Pakistan Finance Division
<http://www.finance.gov.pk/poverty/PRSP-II.pdf> accessed on/23/12/2013

At the time of its independence in 1947, the PKR exchange rate was less than four rupees to one US dollar, recorded at 4.76 in 1960, but by 1999 the exchange rate reached 51 rupees to one dollar; however stability in the PKR was seen from 2000 to 2007 while Shaukat Aziz was Finance Minister and afterwards Prime Minister of Pakistan. During this period, the exchange rate was observed consistent between 59 to 60 rupees to one dollar. It is also interesting to see this was the time when the PKR was gaining in the foreign exchange market and the Shaukat Aziz government provided support to the US dollar from further devaluation in comparison with the PKR to protect Pakistan's exports. However, bad governance and poor economic policies of the new government coupled with other circumstances ruined all previous economic stability and efforts and in 2008 the exchange rate jumped to PKR85;¹¹⁵ this alarmed investors, that their money would obtain less value in the future than it did then. The stability of PKR during 2001 to 2007 demonstrates the direct dependence of the exchange rate on political and economic stability. A government offering consistent policies and political stability may remain successful in stabilising the host country's currency and eliminating the exchange rate threat to FDI.

Economic and social factors are also correlated with the political stability and consistency of the governmental policies having potential to affect flow of FDI. Investors would not be willing to invest in a country where the monetary essentials are too weak to envisage what the government would do next to support a flagging economy. Moreover, foreign investors are unlikely to enhance their contribution to economies that are likely to remain affected by foreign exchange dearth for many years into the future.¹¹⁶ Pakistan had to face extensive dearth of foreign exchange; for decades its reserves remained below US\$1 billion, and its foreign exchange reserves have fluctuated in a capricious manner. There was some progress in the early 2000s, and reserves reached remarkable figures of US\$16.4 billion in 2007 during the regime of Shaukat Aziz, but a change of government led to foreign reserves dropping to the extent (US\$4 billion) where Pakistan found no

115 Currently, US\$1 exchanges @ PKR105.52 (BOI) <www.pakboi.gov.pk/index.php?option=com_content&view=article&id=180&Itemid=137#> accessed 9 January 2014.

116 Sebastian Dullien, Detlef J Kotte, Alejandro Márquez and Jan Priewe (eds), 'The Financial and economic crisis of 2008-9 and developing countries' (UNCTAD 2010) <http://unctad.org/en/Docs/gdsmdp20101_en.pdf accessed 1 June 2014>.

other option than seeking loans in billions of dollars (about US\$12 billion in about two years) to support its falling foreign reserves. As a result, attractive motivations notwithstanding, the large macro-economic discrepancy and slow-moving economic activity discouraged FDI in Pakistan.

3.4.3 Security risks: internal insurgency and war on terror

The law and order situation is one of the most important factors which could affect inward flow of FDI, especially in emerging markets or developing countries. Since its independence, Pakistan was at war with its neighbour India in 1948, 1965 and 1971. These three major battles further led to the 1998/1999 Kargel War between the neighbours, which resulted in further post-war insurgency and border clashes, in a routine manner. Apart from its own wars, due to its geographical location and strategic importance, Pakistan has had to play an important role in wars fought in the region from the early to mid-1980s: Iraq–Iran war, Afghan–USSR war, US–Iraq war 1; and 2 and US–Afghan war are major wars which shook the entire region. As a neighbouring country to all these wars and an active participant in both wars on Afghan soil, Pakistan had to face continuing post-war insurgency and terrorist attacks on its soil. The Taliban influence extended from the far-flung mountains to the Swat region, however GOP imposed a ban against Tahreek-e-Taliban Pakistan (“TTP”) and rid the area from TTP influence by carrying out military operations in 2009. By late October 2009, the Pakistani army assured to step forward in South Waziristan and was in control of Kotkai, the hometown of a key Taliban leader. After clearing South Waziristan, the GOP started operations against local and international Taliban militants in North Waziristan. The operation is led by the regular Pakistan Army and Air Force.¹¹⁷ Due to this operation, once again about one million people have been dispossessed from their homes. Internally displaced people (“IDPs”) had to migrate to the rest of Pakistan, especially to Khyber Pakhtoon Kha province. Once again this internal war and insurgency has cost too much to Pakistan and its nation. Federal and provincial governments have to bear huge expenses in providing temporary shelters, food and medical facilities to IDPs. After

117 Saeed Shah and Qasim Nauman, ‘Pakistan Launches Ground Operation Against Militants: Military Action Follows Campaign of Airstrikes in North Waziristan’ *The Wall Street Journal* (30 June 2014) <<http://online.wsj.com/articles/pakistan-launches-ground-operation-against-militants-1404124420>> accessed 15 July 2014.

completion of the immediate operation, federal and provincial governments would be under an obligation to rehabilitate these IDPs, rebuild and restore their houses and the infrastructure destroyed and affected during the operation. Nevertheless, the ‘war on terror’ had never been an easy task for Pakistan; it has left serious impacts on Pakistan’s economic growth and political and social infrastructure.

The atmosphere during and after war could never be considered friendly for FDI, as it flees from the war region, having a sense of insecurity. A poor law and order situation keeps potential foreign investors on the sidelines. Protection of capital and safety for the human resources engaged in the venture are indispensable elements that administer FDI. Regrettably, Pakistan’s law and order condition has remained far from enjoyable in the areas having capacity of economic growth such as Karachi, all major parts of the province of Baluchistan and Khyber Pakhtoon Khwah.¹¹⁸ Karachi, the main industrial and commercial centre and main commercial port of the country, has been troubled in varying degrees since 1989. In recent years, the law and order condition has also deteriorated in the Punjab province; despite attractive motivation presented to foreign investors, the law and order situation has discouraged FDI.¹¹⁹

In a study in the mid-1990s, the International Asset Management Company (“IAMC”), an associate of British-based Morgan Stanley Asset Management, found that the business atmosphere in Pakistan had worsened considerably. The IAMC analysed 115 leading listed and unlisted companies including multinationals operating in Karachi. The areas covered for the examination included automobiles, banks, chemicals, insurance, energy, textile and apparel, financial services and electrical goods. Some 74% of investors responded that they had no investment plan for 1996/97, while in 1995/96 some 56% of those had not invested in Pakistan. The main reason for the negative response of businessmen was the waning law and order situation in Karachi.

At the start of 2008, the UK-based organisation Control Risks issued a report in which it predicted that, ‘States including Pakistan, Russia, Nigeria and Ecuador may be facing increased risk during 2008’; it stated that inside the world-wide risk atmosphere there is

¹¹⁸ *ibid.*

¹¹⁹ Statement of member of Japanese business delegation in *Karachi Business Recorder* (26 March 1996).

also a rising gap among transnational risks together with terrorism, armed conflict, the impacts of environmental change and pandemics and the methods in place to mitigate them. These risks have the power to cause a large number of human casualties and a stern blow to economies, but efforts to reduce these are still in doubt.¹²⁰

The report said the severity of security risks to belongings or personnel is likely to make formulation of business operations shaky. Foreign companies must seriously consider withdrawal during intense security risk conditions. Report has included Pakistan's name within the list of the countries having extreme security risk. A recent survey still indicates that the law and order situation is a main hurdle in the way of stability in the region and a good business environment.¹²¹

Comparing the situation of south Asia with conflicts prevailing in the rest of world it has been further added that, 'nothing can come close to South Asia. Pakistan's nuisances are generating spill-over effects in Afghanistan and India; and responses from both countries (and from the USA) will intensify Pakistan's political flux and add to security strain across the region.' Pakistan remains among 'Asia's riskiest investment destinations, with a weak government struggling to contain a deadly domestic insurgency.'¹²² Likewise, terrorism expands the extra burden of expenses of the armed forces to meet their requirements to fight against terrorism thus adversely affect the economic condition of the State.

Since 2006, Pakistan has sacrificed both its manpower and material in the war on terror. A committee formed by the GOP in 2011 for the assessment of loss suffered by Pakistan in war on terror estimated loss of life of 35,000 civilians, 3,500 security personnel including armed forces and US\$67.93 billion direct and indirect losses to the economy of

120 'Investment in Pakistan risky: Leading News Resource of Pakistan Report lists Pakistan among states where long-term investment security can't be guaranteed' *Daily Times* (14 March 2008).

121 'Take a Look: Five key Asia political risk themes Eurasia group Defining the Business of Politics 10 Risks of 2009' (5 January 2009).

122 Khan and Kim, 'Foreign Direct Investment in Pakistan' (n 40) 6.

Pakistan.¹²³ By the end of FY 2013, these figures reached 4,000 security personnel, 50,000 civilians and US\$100 billion losses to the economy.¹²⁴ In addition to Pakistan's economy having to bear huge infrastructural damage, there has also been the migration of millions of Pakistanis within the country, destruction of investment environment, and loss of production resulting in trade deficit and balance of payments. Due to fear for the lives of their citizens, Western countries also strongly discouraged their citizens from visiting Pakistan, which negatively affected its exports, inward flow of FDI and speed of privatizations resulting in escalation in unemployment and poverty in the country. The war on terror still continues, leaving further negative impacts on Pakistan which requires the GOP to be more focussed in its policies to attract FDI in its desired sectors to overcome the adverse impacts of war on terror discussed above.

3.5 Choice of Three deterring Factors

The discussion carried out in this chapter has led to four deterring factors namely, political instability giving rise to inconsistency in the policies, signing BITs in haphazard manner without meaningful negotiations, judicial activism and weak domestic legal regime.

It has been discussed that first factor finds its roots in chronic problem of corruption, nepotism and interference in the domain of other organs of the State. Inconsistency in governmental policies which emerges from political instability was seen to be badly affecting the domestic economy and inward flow of FDI. Besides, corruption being an important component gave rise to the judicial activism on one hand whereas on other it also provided legal grounds for international treaty arbitration against Pakistan. Political instability and inconsistency in economic policies somewhat relate to political science and economic research hence is out of scope of legal research and is left for economic and political researchers for research in future. However, investigation conducted above

123 'Economic Survey 2010-11' (Ministry of Finance, Government of Pakistan) <www.finance.gov.pk/survey/chapter_11/Special%20Section_1.pdf> accessed 16 November 2013.

124 Mehtab Haider, 'Pakistan suffered US\$100 billion losses in war on terror' *The News International* (3 June 2013) <[www.thenews.com.pk/Todays-News-13-23252-Pakistan-suffered-\\$100-bn-losses-in-war-on-terror/](http://www.thenews.com.pk/Todays-News-13-23252-Pakistan-suffered-$100-bn-losses-in-war-on-terror/)> accessed 16 November 2013

is likely to provide a clear roadmap for researchers of the relevant subject. Therefore, this thesis mainly focuses on later three legal factors, their choice is justified below.

The research leads to the fact that, besides adopting varying policies the GOP executed 47 BITs for promotion and protection of FDI in different period of time out of which 42 were signed between 1990 to 2004. The BITs signed during this era were seen to be problematic as they laid the foundation for international treaty arbitration against Pakistan. These BITs include Pakistan's BIT with Germany, Turkey, Kuwait, Australia and Switzerland. However, despite facing treaty claims Pakistan has renewed its BITs with Germany, Turkey and Kuwait. Since these BITs have had legal implications for Pakistan therefore signing 42 BITs over the period of just 14 years and then renewing three troublesome BITs require investigation on GOPs mechanism and credibility of negotiating BITs.

The research in this chapter further reveals the conflict between different organs of the State especially executives and apex judiciary. The SCP by extending scope of Public Interest Litigation ("PIL") has taken cognizance of several commercial matters under severe charges of corruption, bribe and kickbacks. The SCP treated corruption as violation of constitutional fundamental rights and by exercising its original and suo moto jurisdiction has scrapped multibillion dollars mega deals such as Reko Diq gold and copper mines, Rental power and Pakistan steel mills privatisation case. Judgments of the SCP in said corruption cases aggravated the relationship of SCP with executives on one hand whereas on the other hand foreign investors alleging aggrieved of annulment of those deals have escalated their disputes to international treaty forums. Therefore, this factor requires further investigation to answer the research question on desirability and constitutionality of judicial activism in commercial and constitutional matters.

The third factor chosen of this investigation relates to effectiveness of domestic legal regime. If, a domestic law acknowledging strong protection for FDI is likely to encourage and promote FDI than a weak domestic legal system creates sense of insecurity and distrust on domestic system and potentially discourages FDI. The law of host State becomes much relevant in the context of FDI especially when investment contract requires for availing domestic remedy or there is a question of denial of justice or judicial expropriation. It is worth mentioning here that current arbitral proceedings against Pakistan have been initiated by the investors following the verdicts of the SCP whereby

it annulled “Reko Diq” and “Rental Power” deals. Therefore, protection accorded to FDI under domestic laws of Pakistan has much importance in current scenario. Besides, it has been observed that to provide domestic remedy to foreign investors subsequent governments enacted several statutes on different occasions. However, it appears that either those law remained ineffective to grant protection to FDI hence are outdated such as Foreign Private Investment (Promotion & Protection) Act 1976 or government itself restricted protection provided in the statute such as Economic Reforms Act 1992 (“PERA”). Therefore, protection accorded to FDI under domestic law reflects weak protection hence is identified and selected as third deterring factor to be discussed in chapter 6.

Investigation on aforementioned factors will guide the researcher to make suggestions to address these factors.

3.6 Conclusion

Study conducted in this chapter has found that FDI plays a considerable role in the development of the host country, by improving its economy and growing the income level of its citizen. FDI is a significant way of transferring capital, skills, technology, administrative skills and management available from all over the world. It plays a vital role in the betterment of the economy, a diminution in the poverty and in the creation of new job opportunities in the host country, especially in underdeveloped countries like Pakistan.

This chapter has also revealed disagreement among investment scholars. They are divided on the question of economic benefits of the FDI for host economy. Intellectuals who support FDI argue that besides risk-sharing it also plays an imperative role in escalation of the host economy as compared to other types of capital flow. Contrary to this another group of scholars believe that FDI does not add into the whole economy and only support a least part of the economy hence its disadvantages are far higher than its benefits. They claim that foreign investors earn huge profit from poor nations and repatriate the profit back to their countries.

The chapter discussed that FDI flows toward countries comprising attractive and perfect location and markets however are least risky. Undoubtedly, Pakistan is an attractive place for FDI and comprises perfect market and perfect location simultaneously. As Pakistan

is a place rich in natural resources like minerals, coal, gemstones and raw material for many basic industries, they all are major source of development. It offers significant opportunities to invest in high profitable sectors such as mining, energy, infrastructure development and real estate. Opportunities to invest in the oil and gas, and mines and minerals sectors also reveal Pakistan as a perfect market for FDI. To overcome the shortage of oil and gas, Pakistan announced a new petroleum policy in 2009 and offered more incentives to attract FDI in this sector.

Benefits and detriments go hand by hand. However, like other countries Pakistan is not free from potential risks having adverse effects on FDI. Destabilized political environment of Pakistan gave rise to inconsistency in the governmental policies having ultimate result of reversal of economic policies, reforms and commercial contracts of the departing governments. This attitude gave rise to unpredictability about the future of economic policies, reforms and pledges of the government, generating additional threats to FDI which include exploration and production fiscal risks, changing fiscal terms, contractual provisions, excessive use of bureaucratic powers and red-tapism. Inflation risk and the currency exchange rate are also significant problems which Pakistan had to attend too frequently. Internal insurgency and war on terror within Pakistan and across its border also added threats having potential to influence governmental policies. A sense of insecurity overshadows the positive features and policies of the government and discourages foreign investors. However, foreign investors may earn maximum profit in such risky environments by considering these risks as common commercial risks and an integral part of corporate decision making, and by managing them efficiently.

CHAPTER 4: BILATERAL INVESTMENT TREATIES

4.1 Introduction

In previous chapter foreign direct investment (“FDI”) in Pakistan, its benefits, potential threats to FDI have been discussed. It has been observed that foreign investors have been reluctant in investing in underdeveloped states citing it as unsafe, fearing risk of expropriation or unfair treatment. To reassure foreign investors the host States have resorted to providing them protection through instruments like multilateral treaties, bilateral treaties, specially tailored domestic laws offering additional protection to foreign investors and their investment. These aspects have been investigated in the context of Pakistan and three deterring factors having legal implications were selected for further investigations. This chapter discusses in detail one of these deterring factors i.e. Bilateral Investment Treaties (“BIT”).

A BIT is an international investment agreement signed between two sovereign States and contains terms and conditions regarding issues surrounding investment by nationals or companies of one signatory State in another signatory State. A BIT is a primary legal instrument used to reciprocally promote, encourage and protect Foreign Direct Investment (“FDI”) in the signatory States. This chapter aims to examine for and against arguments of academics on general controversies surrounding aim, purpose and role of BITs in encouraging and stimulating FDI in the host State. Besides, BIT protection accorded to FDI, the way BIT provisions and phrases have been interpreted by arbitral tribunals and their impacts on sovereignty of host State and inward flow of FDI will also be examined

Pakistan and Germany signed the first ever BIT in 1959, since then Pakistan has signed 47 BITs until June 2013. For the purpose of this research, government of Pakistan’s (“GOP”) approach to signing of BITs are assessed in detail. *Signing of the BITs in haphazard manner without meaningful and purposeful negotiation* has been identified as one of the traditional Pakistani approaches. This notion is examined in detail that whether GOP is involved in signing BITs without having sufficient knowledge or undertaking meaningful negotiations. Also, whether GOP has required expertise, skills, structure, facilities needed for negotiation of BITs is checked.

A selected number of BITs executed by Pakistan are studied in this chapter. Pakistan’s BITs are categorized into two phases; first generation BITs and second generation BITs.

The first phase covers the period until 2004; a mushrooming growth of BITs can be witnessed from 1990-2004. Successive Pakistani governments signed 42 BITs out of 47 in this period. These treaties include Pakistan's BITs with Germany, Switzerland, Turkey, Australia and Kuwait. Some of the BITs signed during this phase laid the foundation for investors' claims against GOP in international jurisdictions.

The second phase of BITs covers the period after 2004 when, following the ICSID claim *SGS v Pakistan*, GOP imposed a ban on signing new BITs. However, the successor government during its 2008-13 terms signed new treaties with Germany, Turkey and Kuwait which superseded old versions of BITs with these countries. However, the Pak-Kuwait BITs have not been selected for this investigation, as its latest version and proceedings of ICSID arbitration arising out of this treaty are not publically available for examination. Furthermore, to explore any improvement or development in Pakistan's approach in signing BITs, this chapter examines both versions of Pak-German and Pak-Turkey BITs. Comparison of the older versions of the BITs signed in 1959 and 1995 and the later versions signed in 2009 and 2012, respectively, helps to explore any significant change and improvement in this deterrent factor.

The instant chapter also examines the significant features and consequences of BITs eg clauses related to investment, FET, MFN, expropriation, dispute resolution and umbrella clauses in the light of treaty claims against Pakistan such as *SGS v Pakistan*, *Bayinder v Pakistan*, *Tethyan Copper v Pakistan*. Treaty issue regarding umbrella clause first arose in *SGS vs Pakistan* will be inspected in detail. This chapter further aims to examine aforementioned clauses incorporated in selected Pakistani BITs in the light of treaty claims heard by arbitral tribunals. It would be significant to examine how said phrases have been interpreted by different arbitral tribunals.

This chapter addresses the following research questions:

1. Whether BITs concluded by Pakistan represent the meaningful and appropriate negotiations or GOP merely followed traditional approach of signing BITs on standard terms in a haphazard manner?
2. Are the BITs ratified by Pakistan designed in such a way to protect both Pakistani sovereignty and investors equally? If the answer is in the negative, how it could

be addressed so as to ensure protection for foreign investors whilst at the same time protecting Pakistani sovereignty?

3. Whether Pakistan's current guiding principles on negotiation and signing BITs mirror the traditional approach or reflect any contemporary progression?
4. Whether GOP is lacking a suitable mechanism and expertise to negotiate and understand the legal implications of BITs, and hence requires a credible setup for this purpose?

This chapter intends to examine aforementioned core issues and find answer of research questions. In the light of investigation, this chapter further aims to suggest reforms on mechanism of negotiating and signing BITs in a meaningful and purposeful way so that a balanced approach could be adopted to protect FDI and Pakistan's sovereignty simultaneously.

4.2 Analysis of BITs and their Important Features and Significance

Due to apprehensions of likely expropriation of foreign investors' assets and of unfair treatment, under-developed States have been seen as precarious financial markets for FDI. However, in the last two decades, the proliferation of modern investment agreements in developing countries which provide added protection above the domestic laws of the host State gave some comfort to foreign investors. Protection of FDI has been addressed mainly in three instruments: bilateral or multilateral treaties, agreements between host State and investor, and foreign investment laws of the host State. These instruments provide certain assurances to foreign investors, violation of which could be considered as breach of such instrument and may result in legal proceedings.

An instrument which deals with the reciprocal relationship of two States regarding investment is called a BIT.¹ By assuring special handling and added protection BITs have proven, to date, to be the best legal instrument to build the confidence of foreign investors in the host economy.² Recognition of the BIT regime as one of the best mechanisms can

1 United Nations Conference on Trade and Development XI (17 August 2004) <[www.unctadxi.org/templates/Page 1006](http://www.unctadxi.org/templates/Page_1006)>.

2 Rudolf Dolzer, *'The Impact of International Investment Treaties on Domestic Administrative Law'* (2006) 37(*) International Law and Politics* 953.

be witnessed from its massive growth from 300 in 1988 to 2,392 by the end of 2004³ and 2,860 by the June 2013.⁴ The effect of the BITs may well be said to increase investor's trust to a higher level than for non-BIT States. According to Sornarajah,⁵ BITs serve for 'knowing the confused state of the law'; they clarify the ambiguous rules in advance which are likely to be applied in the event of any investment dispute. He considers BITs as a satisfactory development in treaty jurisprudence as they are the outcome of negotiation and reduce uncertainty regarding rules applicable to investment disputes.

Besides granting special protection to FDI, the sustainable development, prosperity and strengthening long-term economic cooperation by encouraging inward flow of FDI are said to be motivational tools and main essence behind signing such treaties e.g. first ever Pak-German BIT 1959.⁶ It is suggested that the concept of development should be considered wider method which covers "economic, social, political and legal considerations"⁷ hence protection accorded to FDI in BITs must not be treated in isolation. It is vital to identify and distinguish object and purpose of BITs and evaluate them in the light of their preambles.⁸ It may well be said that BITs demonstrate the will of the signatory States to promote and encourage FDI by assuring that host State would not interfere in treaty rights of the investors. To attract more FDI and to boost its economy, a State earns credibility by trading its sovereignty by means of such assurances

3 'World Investment Report 2005: Transnational Corporations and the Internationalization of R&D' (United Nations Conference on Trade and Development, United Nations 2005) 24.

4 International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal' (UNCTAD No.4 June 2013) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf>.

5 M Sornarajah, *The International Law on Foreign Investment* (2nd ed, Cambridge University Press 2004) pp. 205-08, 213.

6 Federico Ortino, 'Investment treaties, sustainable development and reasonableness review: A case against strict proportionality balancing. King's college London, Colloquium Series Seminar 2014.

7 Federico Ortino, 'Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges" E15 Task Force on Investment Policy, Think piece. International Centre for Trade and Sustainable Development (ICTSD) June, 2015

8 Federico Ortino, "Investment Treaties, Sustainable development and Reasonableness Review: A case against strict proportionality balancing. Centre of Transitional Legal Studies, King's College London Colloquium Series Seminar fall 2014

and submitting to international arbitration.⁹ BITs play a considerable role in improving the confidence and trust level of foreign investors in the host economy by offering a pre-defined and more protectionist regime to the investors of signatory States¹⁰ than international law ever has. According to Nyombi, the signatory parties submit to international arbitration for settlement of investment dispute hence they empower the arbitrators to proceed on any dispute “arising out of the agreement”. He asserts that, being a contractual agreement such instrument employs contractual liabilities on signatory parties once it is executed. Therefore, “the consent is at the heart of investment arbitration”¹¹ hence after agreeing on terms and conditions, the signatory parties are bound of their commitment and assent.

On the other end of the spectrum it is argued that, strong treaty protection does not in itself indicate whether or not BITs have helped the host States to attract FDI. Studying relationships between BITs and flow of FDI, Seriki points out Argentina’s shaky position where it has had to face 40 BIT claims in ICSID tribunals since 1992, whereas it attracted only US\$2 billion FDI in 2005. In contrast, Brazil has attracted US\$11.37 billion FDI though it did not have even a single BIT in force.¹² Hallward-Driemeier’s World Bank research group’s study on twenty years of FDI flow from OECD States to developing States concluded that they could find ‘...little evidence that BITs have stimulated additional investment.’¹³

Rose-Ackerman and Tobin’s study,¹⁴ highlighted by Seriki, indicates that the relationship between BITs and FDI is subject to the level of risks in the host market. The report

9 Anne Van Aaken, ‘Perils of success? The case of international investment protection’ (2008) 9(1) European Business Organization Law Review 1.

10 UNCTAD (n 1).

11 Chrispas Nyombi, ‘EU Reforms of International Investment Law in the Shadow of Brexit’ International and Commercial Law Review vol. 27 Issue 10 (2016) Forthcoming

12 Hakeem Seriki, ‘Umbrella clauses and investment treaty arbitration: all-encompassing

suggested that in a riskier environment the relationship between FDI and BITs is very weak and BITs are found beneficial only for those financial markets which were already stable. However, Neumayer and Spees found some positive effects of BITs in the improvement of FDI flow and the economy of developing countries. They examined the BIT–FDI relationship of 119 countries between 1970 and 2001. According to this study, BITs do what they were signed for and the ultimate result of BITs is that they foster the host economy.¹⁵ It is important to note that that study did not preclude other important factors which play significant and vital roles in attraction of FDI, such as natural resources, market size, location and risk. The importance of these factors has already been discussed in previous chapters in the context of Pakistan.

It has been discussed above that Sornarajah,¹⁶ considers a BIT as an outcome of negotiation between two sovereign States. Besides, this instrument creates reciprocal rights and obligations for both the signatory States hence it gives rise to an interesting debate, whether BITs are really a product of meaningful negotiation between two equals. It may be observed that almost all major capital-exporting States usually negotiate BITs on their own model BIT and exploit FDI needs of developing countries. To minimize the threats and inconvenience to their investors, they seek added protection and additional facilities for their investors.¹⁷ Apparently, BITs are negotiated between two States; however, they hardly represent a product of balanced negotiation between equal parties.¹⁸ Aaken argues that over-protection granted to FDI through BITs negotiated between unequal parties may affect FDI protection and would weaken it in the future. He asserts that perhaps international investment jurisprudence has crossed the limits of FDI protection, which has jeopardized the entire arrangement and consequently would reduce FDI protection in

the future. Guzmán argues that, notwithstanding that BITs offer reciprocal protection and incentives to the investors of signatory States, the real beneficiary of the BITs are seen to be investors of capital-exporting States.¹⁹

A critical analysis of BIT provisions may validate this argument as BIT provisions mainly emphasise on²⁰ level of treatment afforded to FDI, safeguarding against direct or indirect expropriation and a dispute resolution mechanism.²¹ These provisions include National Treatment, Most Favoured Nation (“MFN”) and Fair and Equitable Treatment (“FET”) clauses which have been proven the main bone of contention between host State and foreign investors.

A national treatment clause requires treating foreign investors no less favourably than domestic investors. The MFN clause guarantees that the host State will treat investors of the signatory State no less favourably than the treatment they grant investors from other States. The FET clause necessitates the host State to avoid treating foreign investors with arbitrary or discriminatory acts. Likewise, expropriation clauses protect foreign investors by ensuring that the host State will not arbitrarily acquire their investments without prompt and adequate compensation.²² Majority of foreign investors have recourse to arbitral tribunals on alleged violation of said substantive protections granted to FDI under FET, MFN and expropriation provisions.²³ Besides, BITs also contain ‘cooling off period’ provisions to settle such disputes amicably, before having recourse to

international forums. Such provision lessens the probability of immediate escalation of a dispute to international jurisdiction.²⁴

The BIT clauses appeared to be the most controversial provisions and hence were vehemently contested in treaty tribunals. However, it appears that the arbitral tribunals interpreted these provisions inconsistently in identical matters such as those in *SGS v Pakistan* and *SGS v Philippine*, and *Impregilo v Argentina* and *CMS v Argentina*. Inconsistent interpretation of arbitral tribunals on similar matters have aggravated the controversy on standards of BIT protection to FDI and caused uncertainty over potential outcomes of State-investor investment dispute. While examining the reasons of divergent outcome and conflicting interpretations of treaty tribunals Ortino asserts that the problem rests with an open-ended language of the provisions which have been interpreted by the different arbitral tribunals with different normative concepts. These diverging opinions of arbitral tribunals are creating uncertainty in investment treaty jurisprudence which is now fact of life in investment treaty law and a goldmine for academics. He examined conflicting opinion of tribunals on variety of issues such as “concept of investment to determine the scope of investment treaties and jurisdiction of the tribunals, the content of the various substantive protections guaranteed by investment treaties (such as fair and equitable treatment standards or the notion of indirect expropriation), and the role of investment (arbitral) tribunals ...”²⁵

He found arbitral tribunals struggling in interpreting aforementioned important BIT phrases and reaching at inconsistent conclusion on identical BIT provisions.²⁶ These inconsistent verdicts have negatively affected the object and purpose of BITs i.e sustainable development of host State and protection of FDI as said verdicts have increased uncertainty on standards of protection afforded to FDI and, also undermine the sovereignty of host States. Therefore, to strike a balance between BIT protections

accorded to FDI and right of the host State to legislate in national and public interest it is vital to examine the scope of aforementioned phrases in the light of the verdicts of arbitral tribunals. This examination will further help in spotting legal controversies stemming from BIT provisions granting certain rights and substantive protection to foreign investors. Since this thesis relates to protection of FDI in Pakistan therefore it will be appropriate to examine aforementioned issues under selected BITs of Pakistan.

4.3 Pakistan's Trend on negotiating and Executing BITs

According to Sornarajah,²⁷ a BIT is a satisfactory product of negotiations which provides clarity to the principles on international investment. However, the situation in Pakistan seems largely different. *Executing BITs in haphazard manner and without meaningful and proper negotiations* has been identified as another trend practiced by GOP. This approach finds its roots in an interview of Makhdoom Ali Khan, former Attorney General ("AG") of Pakistan,²⁸ according to whom Pakistan used to execute BITs without having any legal or financial consequences for decades, hence everyone considered it a simple piece of paper. During their foreign trips, the Prime Minister and President used to sign the BITs just for the photo shoot. They did not take into account what they were signing or what the likely consequences of signing such BITs would be.

He pointed out some important dilemmas in the whole scenario such as, the foreign missions and ministry were of consensus that BITs are 'one of the doable', everyone considered it a 'piece of paper' which could be presented to the press as utmost 'good photo opportunity'. He revealed that after almost 46 years from signing the first BIT, no one other than the Ministry of Industry even knew that a BIT had ever been signed.²⁹ Even real stakeholder departments that had direct links with the outcome of BITs had no information about such BITs. Concerned ministries could not produce any file, record or exchange of notes to establish that meaningful negotiations had been conducted between

the signatories. The maximum level of input to negotiations which Pakistan had was proof-reading and no significant suggestion was evident.³⁰ Considering the aforementioned situation, the then Army government issued a directive from chief executive secretariat in 2001-02 and directed to all relevant departments to refrain from signing any new BIT without seeking advice and consent from the AG and all other governmental stakeholders.

The learned AG also acknowledged that, to negotiate BITs many skills and proficiencies, especially legal expertise, were required. Apart from a few learned government officials, there was no shared understanding between government officials on this point. Consequently, GOP continued negotiating BITs without taking into account the serious repercussions of adhering to such an approach. However, he shared his disappointment and anxiety about the consequences in the future, as he could not witness any significant improvement in this approach prior to his resignation in 2007. This led him to the conclusion that due to this passive approach Pakistan is not in a position to follow its treaty obligations which it pledged with other signatory States. Understandably, such an approach would leave Pakistan prone to very expensive investment treaty claims. His statement also raises several questions about the good faith and intention of the GOP towards legitimacy and sanctity of the contents and protections offered in such BITs.

It is significant to mention here that, notwithstanding the above, Pakistan has concluded 47 BITs (up to 2015); its treaty regime has remained calm for almost five decades. By the end of the millennium, except one the *Hubco* power case³¹ (commercial arbitration) no other significant case of violation of treaty or contractual obligation has been reported against Pakistan. The *Hubco* arbitration in an international forum was met with an aggressive reaction of GOP and the SCP. Rejection of modern international arbitration by the Superior Pakistani judiciary³² raised the concerns of the international legal

fraternity.³³ At the start of the millennium, Pakistan has to force several treaty and commercial arbitrations in foreign jurisdictions. Investment claims include *S.G.S v Pakistan*³⁴, *Bayindir Insaat v Pakistan*,³⁵ *Karkey v Pakistan*,³⁶ *Tethyan Copper v Pakistan*,³⁷ *Agility v Pakistan*³⁸ and *Dullah Real Estate v Pakistan*³⁹ (commercial arbitration).

The investigation above reveals the GOP's trend of signing BITs without meaningful negotiations in a haphazard manner and without taking into account the likely consequences. Consequently, Pakistan has faced and is still facing treaty arbitration before ICSID tribunals. The effect of these arbitrations also reflects the Investment Policy 2013 promulgated by the BOI which provides that,

3.1 ... the existing BITs have been negotiated over a period of 50 years by various ministries and there are great inconsistencies between them, which create legal uncertainty for both investors and the government. BOI will develop a model text with assistance of Law & justice Division, which will ensure protection to investment on

reciprocity basis and that model BIT will replace the existing to possible extent while all new BITs will be negotiated on new templates.⁴⁰

Investment Policy section 3.1.3 aims to introduce a new BIT template to negotiate BITs in the future. This part acknowledges the inconsistencies in the text of BITs signed over the last fifty years and the legal uncertainty created by such texts for investors and States equally. The policy has exposed the drawback in the negotiation of BITs in the last five decades affirming that during different periods different ministries negotiated the BITs, meaning that there was never a uniform text for Pakistan's BIT negotiations, nor was there a single department or ministry responsible for negotiating the BITs.. Importantly, the policy acknowledges and validates this study regarding the traditional approaches to BITs and protection of FDI. The intention of this policy was to prepare a template and seek consultancy from the Ministry of Law and Justice, clearly in line with this study.

Considering the vital issues and latest developments in treaty jurisprudence, it is vital to find the discrepancies in the text of the BITs by examining previous and current issues that Pakistan has faced or is facing. This will help to combat any likely complications in the future and to recommend reforms in the light of this investigation. A steady environment will build the confidence of foreign investors and help to stimulate the desired amount of FDI in the required sectors. This necessitates the investigation of the significant features of BITs that Pakistan has executed, the consequences Pakistan has faced to date, the likely consequences in the future and measures adopted by GOP for improvement, if there any.

4.3.1 An investigation into selected BITs in Pakistan

Considering Pakistan's international obligations under the ICSID convention these subsections investigate the selected BITs. This investigation helps to explore any significant change and improvement in the aforesaid trend of signing BITs without negotiation of GOP. This investigation also unearths whether, following the past experience of facing ICSID claims, Pakistan has learnt any lesson and has improved its legacy regarding BITs.

4.3.2 What comprises investment?

Article 7 of Pak-German BIT 1959⁴¹ defines the phrase and provides that term investment shall include different kind of capital brought in the host country by the nationals of the other signatory State such as ‘foreign exchange, goods, property rights, patents and technical knowledge’ including ‘returns derived from and ploughed back into such investment’. Provision further explicates that any partnership, companies or similar asset generated by exploitation of above discussed assets shall comprise investment. It further explains that expression ‘return’ means the profit or interest derived from investment for a specific period. The definition enshrined in above discussed BIT illustrated ‘investment’ in simple words and keeping it limited to the extent of capital, goods, property and patent rights, knowledge and profit or interest in investment.

Pak-Turk BIT⁴² is one of the primary documents which provided the basis to take Pakistan before international forums for investment treaty claims. Article 1(2)(a-e) Pak-Turk BIT 1995 provides that, 2. ‘The term" investment", in conformity with the hosting Party's laws and regulations, shall include every kind of asset in particular, but not exclusively: (a) shares, stocks or any other form of participation in companies, (b) returns reinvested, claims to money other rights to legitimate performance financial value related to an investment, or any having (c) movable and immovable property, as well as any other rights in rem such as mortgages, liens, pledges and any other similar rights, (d) property designs, goodwill copyrights, industrial and intellectual rights such as patents, licenses, industrial technical processes, as well as trademarks, know-how and other similar rights, (e) business concessions conferred by law or by contract including concessions to search for, cultivate, extract or exploit natural resources on the territory of each Party as defined hereafter.’

‘Investment’ includes every kind of assets, particularly moveable and immovable property together with right in rem shares, all sorts of contribution in the companies, money claims or performances having monetary worth. The instant article also included

copyrights, all types of industrial copyright, knowledge, and good will. An important aspect of this definition is that, it included the concessions for search for, extraction or exploitation of natural resources besides all other rights given by means of any law or decision of the authority (ie anybody working under the authority of the government of Pakistan).

The definition further provides one prerequisite which stipulates ‘in conformity with the hosting party’s laws and regulations’. This means the term investment includes everything provided in the instant article subject to the hosting party’s law, however it does not postulate what should happen if the hosting State’s law is silent about the definition. It is important to mention here that Pak-German BIT 1959 seems better tailored in favour of Pakistan e.g. Art 1(1) for the promotion and encouraging FDI provided that, ‘Each contracting State...endeavour to admit in its territory, in accordance with its legislation and rules and regulations.... In the case of Pakistan such permissions shall be given with due regard also to their published plans and policies.’ The provision clearly demonstrates that in addition to reciprocal right under the law and regulations, Pakistan gained the privilege to admit and promote investment and grant permissions under its published plans and policies.

In the context of Pakistan, the first time this phrase came under litigation was in the matter of SGS (a Swiss company). The interpretation of the SCP has been taken as controversial and met with some resentment. The SCP rejected the appeal of SGS to grant injunction against domestic arbitration under the Arbitration Act 1940.⁴³ In the instant case, the underlying treaty was Pak-Swiss BIT,⁴⁴ therefore it is pertinent to have a look at the definition of investment contained in said BIT.

Article 1(2)(a-e) unveils that the instant clause has simply rephrased and reproduced the definition contained in Pak-Turk BIT. However, it added servitudes, mortgage, liens, pledges, and concession falling under public law together with concessions already

discussed in Turkey's part. The instant definition has waived the reciprocal prerequisite provided in Pak-Turk BIT by denoting, 'in conformity with the hosting party's laws and regulations'. While dealing with the appeal of SGS the SCP dismissed it vide order dated 3rd July 2002. The SCP allowed Pakistan to proceed under PSI agreement and restrained SGS from participating or pursuing ICSID proceedings.⁴⁵

The SCP held that, 'the BIT had not been incorporated into the law of Pakistan and no court could enforce any treaty rights arising from the BIT...the PSI Arbitration shall be confined to the claims based on the terms and conditions of that agreement'.⁴⁶

The SCP dismissed SGS's appeal on two grounds: the ICSID convention has not been given effect in the Pakistani municipal law; and the services which SGS was supposed to provide, namely pre-shipment services, were not covered within the definition of investment contained in Pak-Swiss BIT. In the decision on jurisdiction, the tribunal declared that it did have jurisdiction because it was a legal dispute arising out of investment of national of the signatory State as required by ICSID Convention. By doing so the tribunal gave wide interpretation to term 'investment'.⁴⁷ The decision on jurisdiction on the issue of investment was somewhat a relief for the foreign investors struggling for want of proper definition of the instant term. At the same time it was alarming and worrying for FDI-importing States, and particularly for Pakistan for several reasons.

The tribunal seized jurisdiction by ignoring the verdict of the SCP, the fact that Pakistan had not ratified the ICSID Convention in its municipal law and also that the contract between Pakistan and SGS obligated them to try domestic arbitration under Pakistani law. It rejected Pakistan's objection that investment had not been made within the territory of

Pakistan, which is the prime requirement of a BIT.⁴⁸ The tribunal measured the investment of SGS in two ways. First, it held that expenditures made by SGS in relation to the “Pre-Shipment Inspection Agreement” (“PSI”) agreement satisfy the requirements of investment under the provision of BIT. Second, the tribunal weighed the PSI agreement between the parties equivalent to concessional agreement within the meaning of BIT.

*Bayindir v Pakistan*⁴⁹ is another treaty dispute which Pakistan had to defend at ICSID tribunal. The underlying BIT was Pak-Turk BIT, relying on Art II(2) Bayindir asserted on breach of national treatment and MFN standards. Following the MFN clause it also attempted to derive benefits under Art 4 of Pak-Swiss BIT. On question of *Bayindir*’s investment the tribunal held that, Bayindir successfully met the definition of investment and its essential features. Aforementioned BITs signed by Pakistan have been seen to use some phrases very frequently such as, ‘every kind of assets’, ‘knowhow’, ‘all sort of contribution and claims having economic value’. Awards on jurisdiction reveal how some simple phrases can be interpreted broadly and change the entire scenario of the case.

Pakistan vehemently contested the scope of investment in terms of the claimant’s contribution in knowhow and equipment, and asserted that these objects have no economic value, and therefore do not fall within the definition of ‘every kind of assets’. The tribunal rejected Pakistan’s all the arguments by acknowledging the Salini test⁵⁰ and held that,⁵¹ ‘...Bayindir did contribute “assets” within the meaning of the general definition of investment set forth in Article I(2) of the BIT.’⁵²

The Pak-Australia BIT⁵³ is another vital primary instrument which is currently under debate before the ICSID tribunal in *Tethyan Copper v Pakistan*.⁵⁴ The treaty characterizes a wide range of categories falling under the definition of investment.⁵⁵ It further adds to the definition of investment prescribed in the Pak-Swiss BIT, which illustrates ‘every kind of assets owned and controlled by the investor, all sort of tangible and intangible properties and trade secrets’. It expanded the scope of business concessions in terms of any right necessary to carry out financial performance, together with the right to take on agriculture, forestry, fisheries, animal farming, searching, extracting and exploiting natural resources, develop, use and trade products and all other actions linked with investment such as organizing and carrying out business facilities, acquiring, exercising and disposition of property rights including all intellectual rights already discussed in earlier BITs. Besides this, under the instant BIT, first time loan is also included in the list of investments. It is important to note here that in *Joy Mining*⁵⁶ the tribunal refused to seize the jurisdiction holding that bank guarantee could not qualify as investment under the Egypt-UK BIT and ICSID convention equally. Conversely, in *Fedax v Venezuela*⁵⁷ and *CSOB v Slovak Republic*,⁵⁸ the tribunal held that financial instruments, eg loans and promissory notes qualify as investment under BIT and ICSID conventions equally. Keeping in mind the definitions of investment enshrined in Pak-Swiss and Pak-Turk BITs

and their wider interpretation by the ICSID tribunals, the instant definition seems broad enough to cover any kind of asset within the domain of investment.

It is worth mentioning here that the current dispute between Pakistan and Tethyan Copper Company⁵⁹ has arisen on refusal to convert an exploring license into a mining license for one of the world's largest gold and copper reserves in Pakistan.⁶⁰ The definition of investment enshrined in the instant BIT categorically covers the extracting and exploiting, developing every kind of assets owned and controlled by the investor as well as tangible and intangible properties and trade secrets. It further illustrates that any right which is required to conduct the economic activity would be deemed as investment. The importance and relevance of expressions for investment contained in BITs have been discussed in *Romak v Uzbekistan*,⁶¹ where the arbitral tribunal of the Permanent Court of Arbitration held that a BIT may include a long list of assets comprising investment, however, if such asset is inconsistent with the inherent definition of investment 'the fact that it falls within one of the categories listed in Art 1 does not transform it into an investment.'⁶²

In *Kaiser v Jamaica*⁶³ and in *Alcoa v Jamaica*,⁶⁴ the investors made their investment in the mining sector. The tribunal held that where a foreign national investor invested by trusting in the agreement of the host State, such investment is within the meaning of the

ICSID convention. Moreover, the amount spent on development of the concession and other undertakings based on the concession agreement also qualify as investment under the meaning of the convention. To the extent of the definition of investment, the above discussion reveals a situation which may not be comfortable for Pakistan before the ICSID tribunal.

Considering the above-mentioned previous and existing treaty claims against Pakistan, it seems appropriate to explore the scope of investment under emerging treaty jurisprudence before heading to new-generation BITs. Besides, it would be significant to examine the scope of investment under the ICSID convention and the *Salini* case, as both have been considered in the arbitrations against Pakistan.

The ICSID Convention, in its preamble, acknowledges the likelihood of State–investor disputes in view of global cooperation for financial growth. Article 25(1) denotes that, to invoke jurisdiction of the international treaty forum, the utmost important aspect *inter alia* is to establish that there is a ‘legal dispute’ which relate to ‘investment’ of a ‘company or national of signatory State’. The instant article does not define the term ‘investment’, which is the key element in the pyramid of the investment treaty regime. This omission of the drafters generated an interesting debate on the interpretation of investment. The tribunals sought to reach on an understanding to define this term and specify what does constitute an investment.⁶⁵ What comprises an investment has been seen to be an important element to decide the fate of the dispute. Interpretation of investment may also be found in a variety of instruments such as multilateral agreements,⁶⁶ international law and BITs.

*Salini v Morocco*⁶⁷ highlighted some features in the line of definitions of FDI already discussed in the previous chapters. The concept of investment holds some essential

elements which includes contribution, a specific period of time for implementation of the project, sharing some operational risks and contribution to the host economy. Brewer⁶⁸ argues that components of FDI may consist of one or more of the following: equity capital, reinvested earnings and other capital (mainly intra-company loans).

Features discussed in aforementioned definitions, such as lasting impact on host economy, time criterion for State–investor relationship, degree of influence etc, vary, and hence is required to be defined on a case-to-case basis⁶⁹ and in totality.⁷⁰

In *ASTALDI S.p.A. v République Algérienne*⁷¹ the tribunal pointed out three criteria to determine the FDI to constitute an investment. The tribunal highlighted that investment has some contribution to the host economy having monetary value; the investor has borne some cost aiming at his financial goals and such contribution is for a lasting period of time. The tribunal denoted that, neither of these are strict requirements nor mandatory to the effect that such contribution has been made more specifically for the development of the FDI-recipient economy. In *Jan de Nul v Egypt*⁷² and *Helnan v Egypt*⁷³ the tribunals highlighted the same features and stressed to look at these features in their totality. The tribunals further asserted that these features are interlinked, hence may also be considered on a case-to-case basis. In *Saipem v Bangladesh*⁷⁴ the tribunal held that in order to

determine investment under Art 25 it is vital to consider the whole operation along with the construction contract between the parties.

The positive aspect of the omission of a definition of investment under the ICSID Convention is that the convention gave liberty to the parties of the contract to decide which type of investment they want to bring in or keep out of the jurisdiction of the ICSID tribunal.⁷⁵ It has been emphasized that, a host State may tend to define specific classes of investment in its municipal law to promote and protect FDI. The classes which comprise investment under the municipal law and give jurisdiction to the ICSID tribunal also require the written assent of the investor.⁷⁶ However, this right of the parties has been defined in a somewhat restrictive way by the ICSID tribunals. In *Salini*⁷⁷ it was held that parties cannot dilute the essential requirement through their contract or treaty. Following the same dictum in *Joy Mining*,⁷⁸ it was held that, disputant parties cannot define investment through contract or treaty for jurisdictional purpose in a manner contrary to the purpose of the convention and requirement of Art 25.

As to whether the drafters and negotiators of GOP have been mindful of this development in treaty jurisprudence or not, the answer can be found by investigating Pakistan's second-generation and model BITs. To further investigate the scope of investment, the definition contained in second-generation BITs is discussed below.

In second generation Pakistan executed two BITs with Germany and Turkey which superseded their previous BITs. Article 1(a-e) Pak–German BIT 2009. In line with the previous version, it included rights in rem, mortgages, liens and pledges. The intellectual

property rights have further been split into copyrights, patents, utility model patents, industrial designs, trademarks, trade names, trade and business secrets, technical processes, knowhow and goodwill. The categories disqualified from being investments in the model BIT have also been eliminated in this BIT. The exclusion clause has been replaced by a clause merely stating that mere construction and service contracts that do not include an investment component would not be deemed to be investments.

The Pak-Turk BIT 2012⁷⁹ largely resembles the Pak-German BIT 2009 but has an exclusion clause by means of simple explanation that, ‘such investments are not in the nature of acquisition of shares or voting power amounting to, or representing of, less than 10% of a company through stock exchanges which shall not be covered by this Agreement’.⁸⁰ It is important to mention here that BOI claims to negotiate on its draft model however the exclusion clause in the 2008 model BIT again found no place in the latest version of the BIT executed between Pakistan and Turkey. The instant BIT has also removed the condition contained in the Pak-German BIT 2009 which provided that mere construction and service contracts which do not include investment component would not be deemed as investment.

The inconsistency in the BITs signed back to back by the GOP demonstrates that Pakistan is still executing BITs just on desire of the other signatory States. It should have attempted to clarify and explain the scope of investment which must have denoted some characteristics of investment; however, such as, ‘contribution to the host economy’. This characteristic has acquired its own significance in the context of the capital-importing State which cannot be immediately ignored. The value of economic development is evident from several case laws, Art 25 of the ICSID Convention and its preamble which stress on the ‘need for international cooperation for economic development’. In *Patrick v Congo*⁸¹ the ad-hoc committee identified four characteristics of investment and held

that, among them it is the ‘essential requirement that, investments contribute, in some fashion, to the economic development of the host state’.⁸² While rejecting the claim and interpreting the notion of investment, the tribunal relied on the preamble of the underlying US-Congo BIT which states that, ‘such investment will stimulate the flow of private capital and the economic development of the parties.’

Likewise in *Salini*, discussed above, economic development has been set as the main criterion to measure investment. In *Malaysian Salvors v Malaysia*, the tribunal rejected the plea of the claimant to have an investment within the meaning of the ICSID Convention and UK-Malaysia BIT. The tribunal held that, to meet the criteria as an investment the activity should, inter alia, ‘promote some form of positive economic development for the host State’.⁸³

The investigation conducted above reveals that, the definition of investment enshrined in Pakistan’s different BITs are inconsistent, which demonstrate the grossly negligent approach of GOP’s negotiators if any. Whilst signing new BITs the responsables of GOP must have taken into the account the latest development in international arena interms of newly signed BITs, model BITs and outcomes of treaty arbitration. However; nothing like that is evident in the new BITs.

4.3.3 Scope of Fair and Equitable Treatment and Most Favoured Nation

It has been discussed above that to invoke the ICSID jurisdiction an investor is required to establish that he has a legal dispute arising out of an investment. After meeting the first condition the second vital aspect in treaty arbitration is to prove violation of FET standard and entitlement for most favourable treatment. BITs as common practice obligate the signatory States to grant foreign investors FET, MFN and national treatment and guarantee against direct or indirect expropriation.⁸⁴ FET assures a minimum level of

protection which investors of the signatory States and their investment afford in the other signatory State. It further guarantees protection against unfair and arbitrary acts of the host State and its authorities. National treatment and MFN assures that the foreign investors and their investment will not be treated in a discriminatory manner compared to national investors and investors of a third country. The clause entitles them to the most suitable treatment equal to either investors' of the host State or investors of a third country under host State's any other BIT or any other better treatment afforded to the investor of a third country in any manner whatsoever.

Article 1 of Pak-German BIT 1959 stipulates that, investors of either party shall not be subject to any discriminatory treatment compared to nationals or companies of the host State unless relevant law and regulations at the time of enforcement of treaty provide otherwise. Article 2 provides that, investors of either party shall not be treated in discriminatory manner with regard to any activity related to its investment including management, right to enjoy and use such investment unless otherwise provided in the documents of admission of investment. For provision of FET, both articles give prominence to law in force at the time of enforcement of the instant treaty or documents of admission of such investment. The instant BIT does not contain the phrase FET precisely; instead, it explains some understanding in an explanatory note exchanged through diplomatic channels later. The note provides that description of treatment in the first instance was neither practical nor desired by the parties, therefore such concession or treatment shall be governed under the document of admission of investment on case-to-case basis. For greater certainty, it has been further clarified that such protections and concessions or favours will fall outside the scope of MFN or national treatment.

Article 2 of Pak-Turkey BIT requires the signatory States to grant treatment to the investors of either party not less favourable than it grants to its nationals or investors of a third country in similar conditions. Such treatment is subject to the law of the host destination and the investor is entitled to receive whichever treatment is most favourable. Pak-Swiss BIT Art 4 provides a comprehensive elaboration of FET. It obligates the signatory States to protect investment in their territory which has been made under their laws and regulations. It requires that management, maintenance, use, enjoyment, extension and sale related to investment shall not be hampered by means of unreasonable or discriminatory acts. The instant article further requires that the host State 'shall issue

the necessary authorization' contained in Art 3(2). Amalgamating Art 4 with Art 3(2) has extended the scope of FET, as according to said provision it is obligatory that the host State '[s]hall grant the necessary permits in connection with such investment...'.⁸⁴

Article 4 further obligates to ensure FET not less favourable than that afforded by the domestic or most favoured nation whichever is more favourable than afforded under the instant treaty. The Pak-Swiss BIT has a complex and comprehensive elaboration of FET and MFN and has appeared to be a somewhat problematic document for Pakistan in terms of investment treaty claims. In *SGS, Bayinder and Impregilo* claimants attempted to rely on Umbrella clauses contained in Pak-Swiss BIT Pak-Aus BIT Art 3 provides that, subject to its domestic law and investment policy, each party shall encourage and promote investment, shall not impede the management, maintenance, use, enjoyment and disposal of investment and ensure FET in its territory. Furthermore, the instant treaty will not preclude the more favourable advantage granted under any other law or policy of the host destination. Article 4 requires the host party to observe MFN obligations and grant the investor of the other party a favour which it grants to an investor of a third party. However, the instant provision is silent about treatment not less than the domestic investor, national treatment.

An appraisal of first-generation BITs reveals the simple FET and MFN clauses embedded in Pakistan's BITs with Germany, Turkey and Australia; however, Pak-Swiss BIT contains a very comprehensive elaboration of these phrases. The scope of FET and MFN has also been contested aggressively before the treaty tribunal *SGS, Bayinder and Impregilo*. Therefore, it is significant to examine how tribunals dealt with these phrases and evaluate the role they played or may play in treaty dispute.

The limit of legitimate expectations of investors regarding domestic policies and legislation is one of the issues which tribunals have interlinked with FET. In the context of Pakistan, investigating outcomes in such cases are very important, as inconsistency in the policies and regulatory regime has been seen as one of the chronic problem in Pakistan. The tribunals have been seen inconsistent in terms of outcomes while examining under FET standards. In *Occidental v Ecuador*⁸⁵ the tribunal underlined the

predictability in legal and business framework of the host State and held that, the host State is under obligation to not change the legal and business environment in which investment has been made. The *Occidental* case stresses on stability of the legal and business framework as an essential element of FET, violation of which will create breach of FET obligations. The tribunal examined the framework under which the investor decided to invest and was operating, and concluded that the changes brought in the tax laws of Ecuador were inconsistent and unclear; hence, Ecuador violated its FET obligations. A criterion of the legal framework at the time of investment or understanding in documents of admission of investment has also been stressed in Pak-German 1959 BIT. It appears to be however to seek further guidance I have reproduced the original text of Art 2 and explanation note.

Similarly, in *Tecmed v Mexico*⁸⁶ the tribunal highlighted that, the FET standard necessitates contracting parties shall assure a treatment not contrary to the basic expectations of the foreign investors which they considered at the time of making the investment. The tribunal assessed the FET standard on the basis of good faith principles and described the features of FET which obligate that acts of the host State should be consistent, transparent and free from all sort of ambiguities.

The question whether the good faith principle has reciprocal application on State and investor equally or not has been addressed in *Inceysa v El Salvador*.⁸⁷ The facts of the case provide that the investor managed to obtain a concession contract on the basis of incorrect and deceptive information. However, the Ministry of Environment at a later stage refused to proceed further on said concession contract and the investor challenged the decision before the tribunal. The tribunal held that, the investment of the claimant has been made in violation of the philosophy of good faith. The consent of El Salvador has been obtained through fraud and misrepresentation by the claimant, hence was illegal and was held to fall outside the scope of the underlying BIT.

In *CMS Gas v Argentine Republic*⁸⁸ the tribunal stressed on keeping the legal and business environment consistent as well as at the maximum level of perfect utilization of economic resources. The tribunal held that, any act having elements of arbitrariness is itself sufficient to constitute breach of the FET standard. Moreover, the FET standard and legitimate expectations are inseparable from stability and predictability. In *Lauder v Czech Republic* the tribunal relied on Black Law interpretation and denoted that, ‘The Treaty does not define an arbitrary measure.’ According to the instant case’s citation of *Black’s Law Dictionary*, arbitrary means ‘depending on individual discretion; founded on prejudice or preference rather than on reason or fact’.⁸⁹ By accepting the claimant’s assertion of being discriminated against by the arbitrary action of the Czech Media Council, it has been held that, an act which is not based on reasons, facts or law could be called an arbitrary act.⁹⁰

The aforementioned high standard of FET met with great criticism from Sornarajah⁹¹ and has been considered as interference in the sovereign rights of the host State to legislate according to its domestic needs. Sornarajah deemed it as freezing the entire legal system and development in law as well as a tool to further escalate the conflict of interest between host States and investors.

The dissenting voice on such interpretation came in *Saluka v Czech Republic*,⁹² where it has been held that, to measure the frustration of the investor on infringement of reasonable expectation, it should be assessed under the legitimate right of the host State to legislate in the larger interest of its public. In the earlier *CMS* case, the tribunal

considered FET and legitimate expectation attached with stability and predictability. Conversely, the *Saluka* tribunal attached the FET and legitimate expectation with the sovereign rights of the host State to legislate. It was held that, anticipating that prevalent situations will remain the same is irrational. The *Saluka* verdict attempted to create a balanced approach to determine if the FET standard has really been breached. In *Parkerings v Lithuania*⁹³ the tribunal held that, ‘A State has the right to enact, modify or cancel a law at its own discretion... there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.’⁹⁴

Connecting a legitimate expectation rule with a sovereign’s right to legislate became very relevant in the context of Pakistan. In 1998, following the nuclear test, the GOP enacted the Foreign Exchange (Temporary Restrictions) Act 1998 (“FEA”) which imposed certain temporary restrictions regarding foreign exchange by repealing various provisions of the Protection of Economic Reforms Act 1992 (“PERA”). Recently, considering its internal situations and to address insurgency, GOP enacted an unusual statute, the Tahufaz-e-Pakistan Act 2014 (Protection of Pakistan Act).⁹⁵ To address the problem of terrorism and insurgency, suspension of mobile services in Pakistan on several occasions is another classic example of a State’s control over policies affecting the financial interests of the investors. It is pertinent to mention here that huge investment has been made by the foreign investors. To meet the emergency situation in the country, GOP has also decided to impose Art 245 of the constitution from August 2014 and called the armed forces in aid of the civil authorities to fulfil its obligations to ‘defend Pakistan against external aggression or threat of war’.

After imposition of Art 245 in the federal capital validity of the directions issued by the federal government cannot not be challenged in any court. Similarly, Art 245 entails that,

High Court shall not exercise its writ jurisdiction enshrined in Art 199 for enforcement of constitutional fundamental rights related ‘to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245.’ This prevailing situation in Pakistan largely resembles the situation of Romania in 2002 where it promulgated the Emergency Decree to address internal security problems. The decree adversely affected the investment made by EDF and has ultimately been challenged. The tribunal in *EDF v Romania*⁹⁶ followed the dictum laid down in *Parkerings* and held that, FET does not constitute obligations similar to stabilization clauses, hence expecting to freeze the sovereign rights of Romania to legislate is neither legitimate nor reasonable. The abovementioned verdicts reveal the shift of position of the tribunals from *Occidental v Ecuador* and *Tecmed v Mexico* to *EDF v Romania* and *Parkerings v Lithuania*. Consequently, at present, a legitimate expectation of consistency in legal regime and policies of host States under FET standards have no restrictions upon sovereigns’ rights to legislate. Under new developments, host States are free to bring changes in their policies and regulatory framework following their needs unless the BIT incorporates the stabilization clause. Resultantly, investors can only expect a consistent business and legal framework if the host State offers a stabilization clause.

It has been said in the opening remarks that MFN guarantees to an investor of one State to afford the protection and rights not less than that which the host State accords to the investors of another State. An attempt to use the MFN and national treatment standards against Pakistan has been seen in *Bayindir v Pakistan*.⁹⁷

The company accused Pakistan’s National Highway Authority (“NHA”) of affecting the contract to construct a motorway in Pakistan by means of imposing additional taxes, and unfair treatment. It claimed to be aggrieved of GOP’s favouritism to a local contractor, violation of the MFN clause, discrimination and expropriation of investment without any compensation.⁹⁸ It has already been discussed that, in instant case on question of

Bayinder's investment and its contribution the tribunal declined Pakistan's arguments and accepted Bayindir's arguments and held that Bayinder's investment fulfils the essential features of investment.

As discussed above, the first-generation Pak-Turk BIT does not contain a FET clause specifically; hence, Bayindir had to cover this legal deficiency. To defeat the ground of non-availability of FET clause in said BIT,⁹⁹ Bayindir relied upon the MFN clause. It argued that the MFN clause entitles the claimant to rely on FET clauses enshrined in other BITs executed by Pakistan because the MFN obligations encompass the FET standard contained in other BITs.¹⁰⁰ The tribunal affirmed that Pakistan's FET obligations under the preamble of the underlying BIT require Pakistan to maintain a stable framework for investors of the signatory State.¹⁰¹ Consequently, the tribunal ruled to have jurisdiction to entertain the matter.¹⁰² Following the tribunal's decision to seize the jurisdiction, Bayindir reiterated its assertion in proceedings on merit and attempted to import FET clause Art II(2) from Pak-UK BIT.¹⁰³ The tribunal noted¹⁰⁴ that this clause was very similar to Pak-Swiss BIT discussed above which was executed more than three months after the underlying BIT.

On the other hand, Pakistan vehemently confronted this claim and asserted that the MFN clause cannot be stretched to the extent to import the FET clause from other BITs concluded with several other countries.¹⁰⁵ Despite having no explicit BIT provision on FET, the tribunal considered the preamble as a signal from the signatory States to contemplate FET.¹⁰⁶ Considering the preamble and the ordinary meaning of the MFN clause, the tribunal was not persuaded by Pakistan's arguments and allowed to apply the FET standard contained in the Pak-Swiss BIT.¹⁰⁷ However, on merits of the case the tribunal determined that there was not sufficient proof to maintain Bayindir's allegations that the treatment given to the company was politically motivated and distinct to its contractual performance. The tribunal further held regarding said contractual measure there was in fact no use of sovereign authority which could be attributed to the State of Pakistan under the treaty.¹⁰⁸ Pakistan successfully convinced the tribunal to knock out Bayindir's claim on merits.

The effect of the aforementioned verdicts may well be found in the second-generation BIT of Pakistan with Turkey. Article 4 Pak-Turk BIT requires both the signatory States to grant national treatment, FET and MFN status to the investors of the other party in accordance with its municipal laws. The current version of this BIT has precisely included the FET treatment which was not incorporated in its previous version. Article 4 makes it clear that application of national treatment and MFN do not apply concurrently on dispute settlement mechanism among investor and the host signatory State stipulated in, the instant agreement and in other similar international agreement to which one of the signatory parties is a member. Article 5 of the treaty seems in line with the abovementioned awards regarding legitimate expectations of the investors and

sovereigns' rights to legislate and provides certain explanation on exceptions of these standards.¹⁰⁹ The provision also includes the right to legislate for implementation of national policies, or international policies and other obligations prescribed in said Article.

Articles 4 and 5 seem well-defined and focus on the extent of application of FET and MFN in different scenarios and are also clear about exceptions contained in these provisions. The implications of these provisions may well be seen in the current dispute between Pakistan and the Turkish power company Karkey for recovery of US\$700 million damages, pending before an ICSID tribunal. The proceedings before the ICSID and decision dated 16 October 2013 on the petition for grant of provisions measures are not yet public. It is worth mentioning here that prior to this BIT Pakistan executed the new version of the Pak-German BIT. Similar to Pak-German 1959, this BIT does not contain a FET requirement; however, Art 3 requires granting MFN and national treatment. The instant article has also defined the scope of less favourable treatment which has incorporated a variety of circumstances amounting to less favourable treatment. Defining the scope of *less favourable* treatment would help to a certain extent in eradicating the controversies over what constitutes *favourable* and what does not. However, the instant provision does not contain the requirement of 'subject to host State's law and regulation' as was seen in the first-generation BITs. To determine whether these improvements and crucial changes in MFN, FET and national treatment clauses were a result of meaningful negotiation or not, it is appropriate to compare to latest version of Pak-Turk BIT. Should GOP's negotiators have such intention it would also be reflected Pak-Turk BIT, which was executed later.

It is important to note that, contrary to the first-generation BITs, the Pak-German BIT has no provision for obligating 'subject to domestic law and. It seems that the author of the instant clause has been influenced just by some other BIT such as the US Model BIT 2004, otherwise there is no reason to replace domestic law with customary international law. Article 4 of the US draft model denotes that the MFN clause would exclude the scope of *Maffezini v Spain*.¹¹⁰ In *Maffezini*, the claimant escalated its dispute to the

tribunal for arbitration without exhausting the six month cooling-off period and ELR for a further eighteen months. Maffezini, by relying on the MFN clause in the underlying Argentina-Spain BIT 1991, asserted to have right to import the more suitable clause from the Chile-Spain BIT 1991. Spain confronted the jurisdiction of the tribunal arguing that Maffezini has violated the treaty provisions on ELRr. The tribunal inclined with Maffezini's argument and seized jurisdiction by relying on the MFN clause. Expansion of the MFN clause to dispute resolution provisions is seen to be the most crucial aspect of the instant decision. Following the Maffezini dictum, the tribunal in *Siemens v Argentina*¹¹¹ acknowledged the right of Siemens to import the most favourable dispute resolution provision embedded in the Chile-Argentina BIT. The tribunal allowed the claimant to proceed after just the six-month cooling-off period contained in the Chile-Argentina BIT in contrast to the Argentina-Germany BIT which required the complainant to try local remedy for eighteen months.

Recognition of *Maffezini* in subsequent cases signalled the likely approach of tribunals in the future to expand the MFN clause by importing most favourable clauses from other BITs executed by the respondent State. The explanation note in Art 4 of the USA draft could be seen in the light of the aforementioned development in treaty jurisprudence. The unambiguous interpretation of the instant article would be that, the parties clearly tend to exclude broad interpretation of the MFN clause and limit it to the extent of substantive rights instead of stretching it to the dispute resolution provisions. However, contrary to other BITs examined in this chapter, the provision has not incorporated the limitations such as 'subject to the law of the host' State, or 'current or prevailing legislation' etc.

This seems largely analogous to Art 4 of the new-generation Pak-Turk BIT which explicitly denotes that, application of national treatment and MFN do not apply concurrently on the dispute settlement mechanism between the investor and host signatory State. However, new generation BITs do not contain any clear provision or explanation note to exclude the scope of *Maffezini*. Given that Pakistan is an FDI-importing State such exclusion is necessary as the exclusion of *Maffezini* would not affect

Pakistan adversely; instead, it will prevent foreign investors from seeking international arbitration without observing preconditions to commence arbitration proceedings.

4.3.4 Expropriation and compensation

The term expropriation denotes the action of a State to acquire or seize the assets, business and property owned by investors within its territory. It will give rise to the BIT issues if such assets belong to investor of BIT signatory State. The modern interpretation of expropriation includes direct expropriation of foreign investment, nationalization, indirect or creeping expropriation etc. Acquisition of an entire sector or industry is called nationalization of the assets or business. Certain acts of the State or its officials, regulations and policies which adversely affect the foreign investment, its value and benefits may constitute indirect or creeping expropriation.¹¹² It is not necessary that the investor has been driven out or fully deprived of his assets including forced or involuntary sales. Creating a non-conducive business or legal environment under which an investor could not properly exercise his property rights also constitutes expropriation. However, the right to expropriate is interlinked with the sovereignty of the host State and recognised by international law under its minimum standards such as expropriation for public purpose, in non-discriminatory manner followed by prompt and adequate compensation.

The OECD¹¹³ emphasises prompt and adequate compensation¹¹⁴ and provides that without compensation a State has no right to expropriate a foreign investment though is for public purpose. The guidelines of the World Bank¹¹⁵ regarding treatment of foreign investors obligate that, a State neither can expropriate directly nor take such measures having same effects unless such act is followed by appropriate compensation. An appropriate compensation comprises adequate, prompt and effective compensation. In

Amoco Finance Corp. v Iran the tribunal noted that, if provided so in the treaty, expropriation could be legal if conducted for the public purpose followed by prompt payment of just compensation as a rule of customary international law.¹¹⁶

Conversely, the Calvo Doctrine acknowledges the State's right to expropriate without compensation. The doctrine has already been discussed in chapter 2 'State responsibility to protect private property'. Nowadays, there is no controversy on the host State's right to expropriate, because customary international law does not preclude host State's right to expropriate subject to its rules such as taking for public purpose, non-discriminatory manner and with compensation.¹¹⁷ Similarly and almost every treaty acknowledge host State's right to expropriate subject to the provision of such treaty.

However, concern regarding what constitutes expropriation and level of compensation for expropriated assets still exist. Interpretation of expropriation remained long debated before the arbitration tribunals, especially indirect or creeping expropriation. In this context, the wording of the expropriation provision of a BIT plays a significant role in the treaty arbitration. The phraseology of the expropriation clause highlights the investor's rights and the State's obligation, and guides to determine what constitutes expropriation and what does not.

In *Tecmed v Mexico*¹¹⁸ the tribunal considered that, under normal circumstances expropriation denotes the administrative or legislative acts of the government for forcibly acquiring tangible or intangible assets of private persons. The phrase encompasses a variety of circumstances constituting de facto expropriation, such as transfer of assets to third party instead of expropriating State or without awarding such assets to a third party depriving the investor from ownership over their assets.¹¹⁹ Article 3(2) of Pak-German

BIT 1959 provides that, the investment of investors of the contracting parties shall not be subject to expropriation except for the public benefit followed by compensation equal to the [investment affected. Valuation shall be based at or before the time of expropriation and be paid without any unjustified delay. The provision has kept the right of review on legality of the expropriation and valuation intact under due process of law. Article III(1&2) of Pak-Turk BIT 1995 provides that the investment shall not be subject to expropriation, nationalization or any direct or indirect acts having similar effects except made for public purpose. An act constituting expropriation should be in non-discriminatory manner, upon payment of prompt, adequate and effective compensation in accordance with due process of law and general principles of treatment set in the Art II of the instant treaty. Principles of treatment under Art II include equal national and most favourable treatment. The condition to evaluate the compensation is similar to the Pak-German BIT discussed above. Pak-Swiss BIT 1995 specifies the condition similarly to the Pak-Turk BIT, adding the phrase ‘interest on compensation’ with no further explanation, such as rate of interest or evaluation method etc. It does not provide a rule for evaluation of compensation as has been seen in earlier BITs. Pak-Aus BIT 1998 Art 7 provides the same conditions as above with some further explanations and additions. For example, it associated the requirement that the expropriation be for a public purpose with internal needs of the expropriating State. Valuation is associated with market value before the expropriation is publicly known, and compensation includes interest on the amount of compensation at a reasonable commercial rate. In *Tethyan Corporation v Pakistan*, which is pending before an ICSID tribunal, the claimant is relying on the instant expropriation clause. It has been alleged that refusal to grant a mining license to the claimant amounts to expropriation under Pak-Aus BIT.

The fate of the current cases against Pakistan may well be decided in the light of interpretations of phrases contained in the underlying BIT. The aforementioned BITs have incorporated phrases such as direct or indirect expropriation, nationalization, confiscation and measures having the same effects. Moreover, every BIT necessitates that, such act should be for public purpose, whereas Pak-Aus BIT further requires, ‘public purpose related to internal needs’. BITs further specify that, expropriation or similar acts must be in accordance with due process of law, in non-discriminatory manner, followed

by prompt, adequate and effective compensation. Understandably, interpretation of these phrases has much relevance to proving the case of investor. It is important to see how these phrases have been interpreted by the tribunals previously.

In *AMCO v Indonesia*,¹²⁰ the tribunal defined the scope of compensation for expropriation and held that, it includes the loss suffered to the investment and future profit. According to the tribunal, the compensation for the future profit would only be stretched to the direct and foreseeable damage to profit and not the remote damage to profit. It is worth mentioning here that, where the expropriated enterprise has not started earning profit, the amount of compensation would remain limited to the actual value of investment related to expenditures and could not be stretched to future profit.¹²¹

In *Metalclad v Mexico*¹²² the claimant challenged the decision of regional government whereby it refused to issue a license for dumping hazardous waste material, such as asbestos, lead etc near a village. The ICSID tribunal held that, refusal to grant aforesaid permission amounts to indirect expropriation which has not been compensated promptly. The tribunal pointed out that, to estimate the compensation on fair market value and loss of likely future profit, it is vital to consider the profitability history and discounted cash flow of the company. Tribunal awarded compensation to the extent of expenditures given that the claimant did not have enough history of profitable operation. The instant case highlights the scope of ministerial decisions constituting indirect expropriation and importance of background of the profitable operation and expenditures of the company to determine the compensation.

Principles set in claims in *Amco v Indonesia* and *Metalclad* regarding loss of future profit are likely to have a decisive role in the current claims against Pakistan filed by Thethyan,

Karkey and Agility, because none of these companies had started earning profit or had a sufficient history of business operations in Pakistan.

Whether certain acts of the government or its functionaries constitute direct or indirect expropriation or not has also been examined in *Bayinder v Pakistan*. Bayinder claimed that the act under question of the NHA breached the obligation under Art III(1) Pak-Turk BIT to refrain from expropriation of Bayinder's assets without prompt and adequate compensation.¹²³ It further argued that, even if GOP had nothing to do with the said act of NHA, the GOP did nothing to stop the NHA from unjustified expropriation of Bayinder's investment.¹²⁴ It asserted that by incorporating the phrase 'any direct or indirect measure having same effects', the instant clause has broadened the scope of expropriation which equally covers tangible assets and contractual rights.¹²⁵ In contrast Pakistan contended¹²⁶ that, 'there can be no expropriation of a party's contractual rights when such party is treated in accordance with the contract' even otherwise an act which breaches the contract does not constitute expropriation.¹²⁷ The tribunal inclined with claimant's assertion that the definition contained in Art III(1) also covers contractual rights which may well be expropriated like tangible assets. However, the tribunal declined Bayinder's argument that, to establish expropriation it is sufficient to prove that breach of the contract was a result of government's directive.¹²⁸

The tribunal concluded that, regardless of any violation of contract which would deprive the claimant of the economic substance of its contractual rights ‘...expropriation would only be founded if the acts at issue were sovereign acts. The evidence does not point in this direction... governmental involvement is not necessarily equivalent to the exercise of sovereign power when it is grounded on legitimate contractual considerations.’¹²⁹

Instant verdict signifies that a State cannot be held responsible always for every act of the State’s functionaries seeing that some acts may fall short of sovereign acts. It is further transpired that at the expropriation clause contained in Pak-Turk BIT which is also similar to Pak-Swiss and Pak-Aus BITs is sufficiently wide to encompass expropriation of contractual rights.

In *SGS v Pakistan*, SGS alleged that, Pakistan has violated its treaty rights and act and omission of the GOP are tantamount to breach of treaty obligations. The measures taken by the GOP were alleged to have violated Art 6(1) of Pak-Swiss BIT, and to have constituted expropriation.¹³⁰ The tribunal denoted that alleged allegations are for violation of treaty obligations, hence the mere fact that they relate to the performance of the contract does not detract from the jurisdiction of the tribunal, hence it can determine the allegations.¹³¹ However, taking into account the insertion of umbrella clause in Art 11, its formation and chronological order after Arts 3 to 7 of Pak-Swiss BIT¹³² the tribunal rejected the contention of SGS.¹³³

Despite rejection of SGS's claim, the tribunal did not overrule the possibility that signatory States may decide to embrace all breaches including contractual breaches into treaty breach. Rejection of SGS's claim of expropriation amongst others was based on incorporation of Art 11, 'observance of commitment clause', separate from other substantive protection clauses Arts 3-7. The tribunal did not address the issues of what constitutes direct or indirect expropriation. It also did not shed light on the guideline or rules to determine the scope of effective and adequate compensation.

The scope of judicial expropriation and denial of justice is another important aspect of expropriation which has much relevance in the context of Pakistan. Judicial activism in Pakistan is identified as another deterring force (discussed separately in the chapter 5) affecting FDI and giving rise to new treaty claims against Pakistan. As discussed in an earlier part, the tribunals have attached the allegation of denial of justice with the rule of judicial finality. The judicial conduct of the State's court does not amount to denial of justice unless the claimant has exhausted all the local remedies available to him up to the highest judicial forum of the host State.¹³⁴ The tribunal in *Saipem v Bangladesh*¹³⁵ examined the allegation of Saipem where it challenged the series of judgments rendered by the Bangladeshi courts. It has been alleged that, by means of said judgments the courts have revoked the authority of the ICC panel and annulled the award rendered by the ICC. Before the ICSID tribunal, Saipem relied on Bangladesh-Italy BIT and argued that involvement of Bangladesh's judiciary in the contractual arbitration amounted to an uncompensated expropriation. In contrast, Bangladesh relied on *Loewen* and contended that in matters of denial of justice the principle of judicial finality would be applied which requires the complainant to exhaust local remedies before recourse to the ICSID tribunal. The tribunal agreed with Bangladesh's contention to the extent that denial of justice is attached with judicial finality. The tribunal further clarified that, judicial decisions could always not necessarily be considered as denial of justice and may constitute expropriation

under BIT and international law.¹³⁶ In the circumstances, the claimant is not obligated by the judicial finality rule and can seek treaty arbitration.¹³⁷

The instant verdict has acknowledged judicial expropriation as a valid cause of action to escalate the dispute to the treaty forum. It differentiated denial of justice and judicial expropriation, demonstrating that judicial actions may constitute uncompensated expropriation and breach of treaty obligation.¹³⁸ The ultimate result of the instant judgment is that, it provides a cause of action of judicial expropriation alternative to denial of justice. The claimant now can argue that judicial conduct of the host State's judiciary amounts to judicial expropriation, violation of international law and breach of treaty obligation.

Another important factor to investigate is whether compensation is required to be paid in cases of illegal expropriation or if it must be paid even in cases of expropriation under due process of law. In *AIG v Iran*¹³⁹ the tribunal did not hold the nationalization of AIG's assets illegal, in violation of customary international law or under the treaty "Amity". The tribunal could also not find anything discriminatory or contrary to the public purpose in the decision of nationalization. It deemed the decision of nationalization by the Iranian government just and legal. Regardless, the nationalization took place under due process of law, so the tribunal held that AIG made investment on encouragement of Iran and after nationalization Iran became the beneficiary of all assets of AIG, hence AIG is entitled to full compensation.¹⁴⁰ Despite declaring the act of Iranian government to nationalise the AIG's a valid, legal and just act the tribunal held that AIG was entitled for compensation.

Tribunal acknowledged that AIG invested on encouragement of Iranian government and Iran is beneficiary of all nationalised assets of AIG.

Some of Pakistan's BITs discussed above also include 'interest' under the scope of compensation. The effect of such a clause and the scope of interest could be seen in *Asian Agricultural Products v Sri Lanka*¹⁴¹. The tribunal disagrees on the grant of compensation of likely profit in future,¹⁴² however, it has been held that interest is an essential element of the compensation which must be calculated from the date of expropriation to the date of payment.¹⁴³

In *Middle East Cement v Egypt*¹⁴⁴ the tribunal relied on Art 4(c) of Egypt-Greece BIT holding that, interest is a fundamental component of the compensation. It concluded that, for the purpose of effective and adequate compensation it is appropriate to award compound interest on the compensation from the date of expropriation until the date of payment of the award.¹⁴⁵ The tribunal took into account the rule of international law and disregarded the municipal law which prohibited the compound interest.¹⁴⁶

The latest developments in the treaty regime suggests that for direct or indirect expropriation or measure having same effects the principle of full compensation can only be satisfied by awarding compound interest until the award is fully satisfied. After

investigating the scope of the phrases discussed above it is necessary to examine Pakistan's second-generation BITs.

Article 4 of Pak-German BIT 2009 has been drafted somewhat in the same pattern of the old version with some fundamental additions already incorporated in other BITs. The new version has categorically included terms 'nationalization' and 'other measures tantamount to expropriation or nationalization' which were not included in the old version. Similarly, it requires for provision of interest until the payment of compensation at usual bank rates. Like its old version, the instant BIT has kept the right of review intact on legality of the expropriation and valuation under due process of law. Interestingly, the expropriation and compensation provision in the new BIT is seen to be consistent with its old version and has not included the most debated phrases such as 'discriminatory act' or 'prompt, effective and adequate compensation'. Instead, the BIT requires for payment of compensation equivalent to the value of the expropriated assets.

The expropriation and compensation provision Art 6 of Pak-Turk BIT 2012 has also been drafted in a similar manner to the old version. It includes the requirement for prompt, adequate and effective compensation. The new version provides a comprehensive elaboration on non-discriminatory legal measures. It made clear that non-discriminatory legal actions adopted for the protection of genuine public welfare objectives such as health, safety and environment would not amount to indirect expropriation. In contrast to the old version, the new BIT has included the scope of interest if payment of compensation is delayed, which is similar to the new Pak-German BIT. In the context of expropriation for public interest the dispute involving *Methanex Corp v United States of America* is an important matter. The tribunal dealt with the issue of a ban on harmful substances through State legislation following environmental damage. The claimant challenged the legislation of the State of California alleging that the State of California had failed to treat the claimant under the minimum standard contained in Art 1105 of NAFTA and the act of the State and its governor amounts to expropriation under 1110(1) of NAFTA. It alleged that measures adopted by the Federal State of the USA, its environmental regulations, were tantamount to disguised trade and investment restrictions just to advantage local investors and their industries, hence also violates the

national treatment clause.¹⁴⁷ The tribunal rejected both of Methanex's claims¹⁴⁸ and did not hold the USA responsible for expropriation.

Nevertheless, explaining the scope of expropriation is central in defining whether a sovereign State can legislate in the context of public interest which is contrary to the private property rights of the investors. Host State's legislation to confiscate investors' property may amount to a violation of other protections afforded to the investors. Moreover, regulatory intervention with investments may also be a violation of the pre-arranged and agreed provisions of fair and equitable treatment, most favoured nation treatment, and national treatment.¹⁴⁹

In *S.D. Myers v Canada*, an embargo by the Canadian government on the Trans Frontier's export of PCB leftover or waste (inaugurated, at least in portion, to safeguard that the leftover was disposed in a manner which is sound in the environmental perspective), the tribunal observed that said procedure did not constitute an expropriation.¹⁵⁰ Yet, the tribunal observed that the prohibition established a violation of the principles related to fair and equitable treatment and national treatment which require compensation for breach of indemnities.

In another case, *Azurix v Argentine Republic*,¹⁵¹ involving public interest the ICSID tribunal considered the matter of alleged expropriation by the host State under the 1991 Argentina-US BIT. In this case, an issue which included a water allowance agreement; the government of Argentina legislated for the safety of community health. The State

authorities cautioned inhabitants not to drink the water and prevented them from paying the water bills to US investor *Azurix*. In October 2001, relying on US-Argentina investment treaty, Azurix initiated a claim looking for indemnities in excess of US\$600 million. In this verdict about the alleged expropriation and violation of principles of equitable and impartial treatment by the Argentinian government, the tribunal could not find any reason to hold the State's action an expropriation. The tribunal perceived that the procedures adopted by the officials of Argentina were the practice of its communal authority to safeguard public health. However, on the issue of equitable and impartial treatment the tribunal held that Azurix had been refused equitable and impartial treatment because the actions of Argentina actively inspiring the investment were below international standards. It was held that the investor had been refused equitable and impartial treatment¹⁵². In fact, the tribunal noticed that the principles of BIT oblige the States to "pro-actively" encourage and protect the foreign investment. This led to an unsatisfied legitimate expectation of an investor. In the final conclusion, the tribunal awarded compensation equal to a sum of US\$165 million by adopting an 'actual investment' approach.¹⁵³

Aforementioned verdicts indicate the inclination of treaty tribunals to stretch certain substantive guarantees and to award compensation despite they found the act of the State authorities within legitimate exercise of their sovereign powers. Currently, Pakistan is facing three arbitral proceedings on somewhat same grounds amongst others. The expropriation clause read with other substantive guarantees to foreign investors obligates Pakistan to grant a high level of protection and treatment to FDI. However, due to its current geo-political situation and crisis Pakistan appears to be unable to observe its treaty obligations.

Besides aforementioned, the investigation on the expropriation clauses contained in Pakistan's second generation BITs reveals that these instruments failed to acknowledge the fact that despite creating reciprocal rights for both the signatory States these BITs

would have different implications for Pakistan as the capital importing State, as there are significant differences between the rights and obligations of investment-importing and -exporting States. The new-generation BITs have been prepared after the emergence of judicial activism in Pakistan, which gave rise to some treaty claims against Pakistan. However, Pakistan's drafters and negotiators have completely ignored this important aspect. Had they been vigilant about this issue they would have attempted to address this problem by explaining Pakistan's position by excluding the scope of application of *Saipem v Bangladesh* and *Loewen v United States*, as US did in its model BIT 2004 by excluding the scope of *Maffezini v Spain* and by incorporating the provision to address the situation similar to *Methanex v USA*.

4.3.5 Exhausting Local Remedy First and Application of MFN and FET

Exhausting local remedy rule ("ELRr") before recourse to international forums is another important principle which continuously remained under debate among investment treaty scholars. The principle obligates foreign investors to seek legal remedy in municipal court before taking it to the international forums.¹⁵⁴ Traditionally the ELRr developed into the customary international law as a prerequisite to challenge the act of a State in international forums.¹⁵⁵ ELRr finds its roots in several legal instruments and doctrines such as, the Calvo Doctrine,¹⁵⁶ International Law,¹⁵⁷ and concept of Equal National Treatment and in United Nation's ("UN") resolutions giving primacy to the sovereignty of the States.¹⁵⁸

Like other provisions of BITs, the courts and international tribunals seem inconsistent while addressing the question, Whether ELRr is compulsory under international law or its scope is merely a procedural one? ICJ held¹⁵⁹ that it is not obligatory to try every theoretical possibility but just to raise the issue and then recourse to arbitral tribunal. In Anglo Iranian oil case it was held¹⁶⁰ that in indirect international wrongs international remedy cannot be invoked without availing local remedy.

The 1996 ILC refers ELRr as substantive whereas text of 2001 ILC denotes that liability of a State may not be called upon if claimant did not avail local remedy when ELRr was applicable.¹⁶¹ Whereas in LIAMCO it was held¹⁶² that, on State's refusal to try arbitration conflicting to its implied waiver of ELRr renders the rule ineffective thus it is not obligatory for claimant. The parties to a treaty or agreement can exempt its application with express mutual consent. Emergence of investment treaty jurisprudence brought significant changes in ELRr and at present it does not apply in strict sensu unless clearly embedded in underline BIT such as first generation BITs China.¹⁶³ The current generation BITs demonstrate an overwhelming trend to relinquish ELRr giving direct access to foreign investors to international forums of arbitration. Besides, the rules of ICSID Convention regarding ELR¹⁶⁴ are fairly clear and predefined which authorize the signatory State to incorporate ELRr in BIT, in investment agreement or in ratification docs while affirming or signing this convention. ICSID rules as well obligate the arbitral

tribunals to follow the host State's law along with applicable rules of international law while dealing with State-investor dispute. Rules allow the parties to agree otherwise but such agreement should stipulate this exception clearly.¹⁶⁵ According to Schreuer¹⁶⁶ in essence Art 26 clearly relinquishes ELRr unless signatory parties clearly opt to adopt ELRr.

As said earlier that, tribunals' understanding on ELRr remained inconsistent which created further ambiguity regarding application of ELRr. In *Maffezini v Spain* ¹⁶⁷ the tribunal allowed the claimant to recourse international arbitration directly and seized the jurisdiction despite underline treaty Argentina Spain BIT contained six months cooling off period and eighteen months for exhausting local remedy.¹⁶⁸ While doing so, the tribunal relied on MFN clause of underlined treaty and allowed the more favourable dispute resolution mechanism embedded in Chile Spain BIT.¹⁶⁹ Likewise, in *Ronald S Lauder v The Czech Republic* ¹⁷⁰ the arbitral tribunals took cognizance despite the cooling-off period clause embedded in the treaty not being exhausted.¹⁷¹

Notwithstanding the aforementioned trend of waiving ELRr, the rule is seen to be getting its sanctity back under the grab of "denial of Justice". Decision of arbitral tribunal in

Loewen v United States¹⁷² came into limelight when tribunal despite express waiver of ELRr in underlined treaty held that, when claimant asserts on denial of justice it is mandatory to satisfy ELRr before recourse to treaty forum.¹⁷³ Tribunal held that State may not be held responsible for judicial act unless it attains the judicial finality and creates an international wrong. The judicial finality rule renders the ELRr waiver ineffective hence when a judicial act breaches international law the ELRr is required to be followed. Commenting on the award Mavluda¹⁷⁴ asserts that Loewen decision reinstated the ELRr under the grab of judicial finality rule and as well disregards the clear provisions of NAFTA¹⁷⁵ and ICSID Convention. She observes that due to disguised reinstatement of ELRr it is very unlikely that foreign investors could rely on multiple grounds and causes of action before the international tribunals. The decision on award has sowed the seed for inconsistent and contradictory precedents in treaty jurisprudence on ELRr.

In Generation Ukraine v Ukraine,¹⁷⁶ the tribunal required for ELRr obligation when matter of indirect expropriation was under question. The tribunal held that, understandably there is no treaty obligation to avail local remedy before resorting to the arbitral tribunal. However, in the absence of clear treaty violation distinguishable from the conduct of the respondent, mere allegation of indirect expropriation was doubtful which is highly technical matter and falls under Ukrainian planning law.

Similarly, in *Waste Management v Mexico*¹⁷⁷ the ELRr has been discussed in the perspective of FET afforded to the foreign investor in the host State. The tribunal concluded that undoubtedly the ELRr is a procedural requirement to resort to treaty arbitration. Nonetheless, in the matter of contractual breach the ELRr is relevant to ascertain that the under question act of the State meets the treaty standard or not. While concluding the proceeding the tribunal could not find a denial of justice at the part of Mexico amounting to violation of treaty obligation.

Reacting on above discussed decisions Schreuer called them “Calvo’s grandchildren.”¹⁷⁸ Perhaps it would be hyperbole to suggest that these decisions reveal the tribunals’ determination to obligate ELRr before escalating the dispute to international forums. Nonetheless, the decisions may sow the seed for reinstating the ELRr through backdoor. He asserted that such verdicts seem very close to reinstating the exhausting of local remedy principle in international arbitration. If principally foreign investors are obligated to follow ELRr no one could stop moving one stop further to exhaust local remedy as a rule. Disguising the ELRr under judicial finality, distinguishing contractual and treaty violation under the paradigm of FET etc will deprive the foreign investors to rely on multiple causes of actions in their claim as well as will revert back the investment treaty jurisprudence to Calvo doctrine.

4.3.6 Umbrella clauses

The scope of umbrella clauses will be examined in this section as of the important aspects of treaty arbitration.

The umbrella clauses have made it possible for investors to escalate the contractual dispute to the treaty forum alleging that failure of the host State to comply with the contractual obligations amounts to breach of treaty obligations. Application of umbrella clauses gave rise to several controversies, especially when the commercial contract itself contained a choice of forum clause. The main concern about umbrella provision is use of a variety of phrases creating vast obligations for the host State such as; ‘commitments’,

‘any obligation’ and ‘any other obligation’. Pak-German BIT 1959 Art 7 provides that, ‘either party shall observe any other obligation it may have entered into with regard to investment by national or companies of the other party.’

Like other clauses contained in the Pak-Turk first-generation BIT, Art VI also seems well drafted to create umbrella protection for foreign investors. which provides that, ‘This agreement shall not derogate from: obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, that entitle investments or associated activities to treatment more favourable than that accorded by this Agreement in like situation.’ The clause has made it mandatory for the host State to observe treaty, investment agreement and investment authorisation commitments and obligations in relation to investment and associate activities especially the most favourable one.

The most-debated clause creating umbrella rights for the investor has been enshrined in the Pak-Swiss BIT. Article 11 provides that, ‘Either contracting party shall constantly guarantee the observance of the commitments it has entered into with respect to the investment of the investors of the other contracting party.’ Instant Art has obligates the signatory States shall always assure adhering to the obligations it has agreed regarding investment of the investors of the other contracting party. Similarly, Art 3(4) of the Pak-Aus BIT signifies that this agreement entitles the investor of either contacting party to obtain benefit of ‘any law or policy’ adopted by the other party which is ‘more favourable than’ the instant treaty.

The effect of the aforementioned or similar phrases has been seen in several treaty claims; however, in Pakistan’s perspective, the umbrella clause was discussed for the first time in the *SGS* case. *SGS*, in disregard of the choice of contractual forum for dispute settlement, commenced ICSID arbitration relying on the umbrella clause enshrined in the Pak-Swiss BIT. On the other hand, in July 2002, the Supreme Court of Pakistan (“SCP”) ruled that *SGS* could not rely on Pak-Swiss BIT given that Pakistan has not incorporated the Washington Convention in its domestic laws. The SCP also held that *SGS* was not an ‘investor’ within the meaning of the ICSID Convention and the BIT.¹⁷⁹ Conversely,

before the ICSID tribunal, SGS successfully argued that the Pak-Swiss BIT had dominance, thus choice of treaty forum supersedes the choice of contractual forum. The tribunal seized the jurisdiction specifying that the tribunal would hear the matter to the extent of breach of treaty obligations, as it has no jurisdiction on SGS's claim regarding breach of PSI agreement.

In the instant case, the location of the umbrella clause in the Pak-Swiss BIT played a decisive role in the verdict of the tribunal. The tribunal was of the view that placement of the clause near the end of the Swiss-Pakistan BIT, in the Swiss model BIT manner, was suggestive that contracting parties did not tend to create a substantive obligation. The tribunal considered that if the contracting parties ever had intention to create a substantive obligation through the umbrella clause it reasonably would have been placed alongside the other 'first order' obligations. It was held that, by relying on umbrella clauses a tribunal constituted under BIT cannot extend its jurisdiction over the contractual disputes.¹⁸⁰

Controversy over the contractual claim and treaty claim remained long debated before the arbitral tribunals, with inconsistent outcomes. In *SGS v Philippines*¹⁸¹ the tribunal dealt with a similar issue as discussed above, but it reached a different conclusion. In the instant case, the SGS attempted recourse to the ICSID arbitration asserting violation of its treaty and contractual rights simultaneously. Distinct to the decision in *SGS v Pakistan*, the tribunal in *Philippines* held that, it had jurisdiction equally upon SGS's treaty claims and its contract claims,¹⁸² as it was '...clear from the general language of Article 25(1) that ICSID jurisdiction may extend to disputes which are purely contractual in character.' The tribunal also observed that the analysis of the tribunal in *SGS v Pakistan* was not only 'unconvincing', but also 'failed to give any clear meaning to the "umbrella

clause”.’¹⁸³ The tribunal while rebutting the scope of placement or location of the umbrella clause in *SGS v Pakistan* asserted that the placement of the clause could be ‘entitled to some weight’, although it is not too vital.¹⁸⁴

Application of umbrella clauses in similar cases but in distinct manners elevated uncertainty and concerns over such clauses. Conflicting outcomes in these two cases gave rise to controversy over application of the umbrella clause on State–investor independent investment contracts. In *BIVAC v Paraguay*¹⁸⁵ the ICSID tribunal held that, it has jurisdiction over a claim under an FET contained in Art 3(1) and umbrella clause contained in Art 3(4) of the BIT, though it declared the claim as inadmissible¹⁸⁶ It was held that Art 3(4) of BIT does not override the exclusive jurisdiction clause contained in Art 9(1) of the contract whereby the contracting parties agreed and submitted to the jurisdiction of Tribunals of the City of Asunción for resolution of the “any conflict, controversy or claim which arises from or is produced in relation to [the] Contract”.¹⁸⁷

The Pak-German BIT 2009 Art 7(2) ‘application of other rules’ provides that:

“Each contracting State shall observe any other obligations it has assumed with regard to investment in its territory by investors of other contracting State with dispute arising from such obligation being redressed under the terms of the contracts underlying the obligations in accordance with Art 10(5).”

Article 10(5) stipulates in unambiguous terms that an investor is required to follow the choice of forum clause unless the dispute relates to violation of the instant treaty including Art 7(2) of the instant BIT.

The new version of the Pak-Turk BIT does not provide any term similar to Art 6 of its previous version. However, Pakistan needs to be careful while negotiating such terms or at least negotiate subject to some clarificatory notes. To avoid uncertainty over the application of umbrella protection and choice of forum, GOP is required to insist on provisions similar to Art 10(5) of Pak-German BIT 2009 already discussed above.

4.3.7 Open-Ended BIT Provisions and Authority of Arbitral Tribunals

In the light of discussion carried above, it would be correct to suggest that, the ambiguous and open-ended phrases and provisions of BITs are one of the key reasons of conflicting views of arbitral tribunals. These provision have added into uncertainty and confusion on the likely outcome in investor-state investment dispute. To address legal uncertainty on such substantive provisions of modern investment instruments Ortino suggests concentrating to spell out the limit and latitude of protection traditionally granted to FDI in such treaties. He emphasises on clarifying and defining key phrases and provisions seen to be problematic such as available remedies, direct and indirect expropriation, FET and MFN.¹⁸⁸ In another study Schreuer, Muchlinski and Ortino emphasis on uniform interpretation of treaty provisions as a greater task for creation of a predictable investment regime and to avoid further ambiguity and distrust.¹⁸⁹ It is suggested that the similarity contained in these treaties may lead to explicit interpretation of important phrases and provisions, despite the fact some of them may have their unique features as BITs are meant to be a product of negotiations between the signatory States.

The abovementioned report stresses that a uniform and predictable standard of interpretation and consensus on understanding to substantive rights and obligations would benefit the host State and investors mutually. It will help the host State to bag

required FDI and its advantages on one hand, whereas on the other, a vibrant, protected, and foreseeable investment environment will provide a true sense of security and protection to foreign investors. Report further emphasises on considering combination of public and commercial concerns and to strike a balance between right and obligations so that complementary aims could be achieved. It is recommended that, new generation BITs may incorporate new investor-State rights and obligations clarifying the social and economic outcomes of FDI on host State and ensure the standards of the corporate social responsibility are met by the investors. Besides, it is vital to clarify the “scope of the host Country’s right to regulate alongside the existing rights of investor for protection their assets... a further long-term objective for the development of this field should be to promote alternative methods for the resolution of investment dispute apart from arbitration. The later should be seen as a last resort remedy, given the increasingly adversarial nature of the process.”¹⁹⁰

The above discussion highlights the importance of the role and authority of the investment tribunals in investor-state arbitration. Ortino as well examines question of the arbitral tribunals’ authority and limit to evaluate the conduct of the host State on the basis of investment treaties. He contends that, whilst reviewing the host States’ conduct, the arbitral tribunals lack institutional mechanisms and constitutional framework and precautions which are necessary to set a plausible check and balance upon rights and authority of such tribunals. Consequently, the tribunals fall short of the features such as “independence of judiciary, appellate review, separation of power, and written constitution that gives judges the right to decide which compelling interest should prevail.”¹⁹¹ It is argued that the investment treaties concentrate on investment protection and intend to cover variety of aims such as prosperity, sustainable development and pursuit several policy interest. These treaties are not merely for protecting and encouraging FDI instead are meant to “ensure economic growth, environmental protection and social equity”. Therefore, these instrument simply must not only accord strong protection to FDI but should also protect host State’s sovereignty to take necessary measures and

legislate/regulate its statutes and policies to protect larger national and public interest. The, object and purpose, complexity and investment protection accorded in these treaties necessitate that the conduct of the host state must not be read in line with strict balancing or proportionality requirements. Ortino concludes that, whilst applying the reasonableness test on the act of the host State the tribunals should evade reviewing on the basis of cost benefit balancing. Therefore, it appeared to be necessary to describe the maximum/outer limit of the role of arbitral tribunals. For more balanced and pragmatic approach that protect the foreign investors' rights and assets as well as respecting the sovereignty of the host State following recommendations were made by Ortino. It is recommended that the treaties focus on host State's responsibility to act in a non-discriminatory and reasonable way, ignore the umbrella and stabilisation clauses which assure contractual and regulatory stability and obligate the host State only in the event of direct expropriation. To address the aforementioned problem, limited objectivity of the investment treaties he has divided the problems in current economic regulatory issues and long term social issues and recommends extending the scope of investment instruments to cover them. According to his list the earlier covers market access, corporate governance and responsibility, taxation, anticompetitive conduct whereas the later includes the human rights, employment, environment and corruption. This thesis argues somewhat in similar lines in Pakistan's perspective, after having critical investigation of selected BITs in current chapter and domestic laws in chapter 6.

4.4 Conclusion

The aforementioned investigation on selected BITs and treaty arbitration matters reveals that BITs have been utilized by the host states to provide protection to the foreign investors. Main constituents of a BIT are, the scope of investment, clauses addressing the degree of treatment which would be given to foreign investor, protection against expropriation and mechanism to be adopted in case of treaty dispute. It has been seen that most capital exporting states tend to negotiate the BITs according to their own model BITs. It is also a valuable point to be noted that even though it is a reciprocal agreement between two unequal signatory parties, conditions embedded in the BITs providing major protection to investor make it more beneficial for the capital exporting states. It has been observed that the rulings of tribunals in cases of even similar nature have been inconsistent, which has been mainly due to difficult interpretation of clauses such as umbrella clauses. Some BITs also contain ELR clauses which at present are not

compulsory unless they are incorporated in the BIT, still there are some instances when ELR has not been observed despite its presence in the BIT.

The current investigation on selected and Pakistan's model BITs in the light of a variety of arbitration cases, reflect GOP's tradition of either executing BITs without negotiation or negotiating on standard terms and models brought by the capital-exporting States. Lack of knowledge and skills required to negotiate BITs have been noted. There have been no proper system or uniform text applied by Pakistan for designing BITs. While assessing the relationship between FDI and BITs some have deemed BITs to be boosting the economy while others have attributed its influence on FDI to the degree of risk or favourable conditions in the host nations.

Major attributes of first generation and second generation BITs of Pakistan have been examined which revealed number of problematic clauses in different BITs. Crucial aspect in settlement of dispute over the definition of investment has been observed. Assessing the investment clause of BITs executed by Pakistan show that explanation of investment incorporated in various BITs executed by Pakistan are inconsistent which necessitates that BIT clauses must be carefully and consistently expressed in treaties.

The FET and MFN clauses embedded in first generation BITs (Pak-German 1959, Pak-Turk 1995, Pak-Aus) are seen to be very simple in nature whereas only Pak-Swiss BIT has explained it in detail. The second generation BITs; Pak-Turk 1995 in addition to requirement of MFN, National treatment for foreign investors has been included in FET clause as well which wasn't explicitly described in earlier version, whereas Pak-German BIT 2009 is pretty much similar to its previous version. It contains requirement for MFN and national treatment but FET is not included. The instant article also included less favorable treatment clause, it was checked whether these changes in MFN, FET and national treatment were a result of significant negotiations or not. It has been observed that instant BIT has linked FET with investors legitimate expectations of host State instating consistent domestic policies and business framework, which can have major impact on Pakistan's ability to introduce new acts and policies in the future due to numerous situations like terrorism, insurgency etc.

The investigation as well revealed inconsistent verdicts of arbitral Tribunals on above-mentioned issue. Some have deemed business and legal framework of host state should

be consistent and stable while others suggested host state should have right to exercise its sovereign rights for interest of public. At present host states are free to do changes in their policies as per their domestic needs. It has been further observed that investors are reluctant to invest in underdeveloped countries due to risk of expropriation hence BITs contain clauses addressing expropriation issues. Expropriation clauses in first generation BITs; (Pak-German BIT 1959 and Pak-Turk BIT 1995) state, expropriation should not be exercised except for public purpose, in such a case a just compensation should be given whereas in Pak-Swiss BIT 1995 a further phrase of interest on investment has been added, in Pak-Aus BIT 1998 public purpose has been associated with internal needs of host state. The expropriation clause in second generation BITs is similar to its earlier version with minor changes. Umbrella clause in the second generation BIT i.e. Pak-German 2009 BIT is entirely different from the first generation BIT i.e Pak-German 1959.

As from above discussion it can be observed that Pakistan has been inconsistent in designing their BITs. It appears that GOP has ignored the lesson from treaty claims against Pakistan: the latest example provisions of the new BIT with Kuwait provided the basis on which a Kuwaiti company, namely Agility, gained an opportunity to commence ICSID arbitration against Pakistan. Similarly, Karkey relying on the Pak-Turkey BIT and Tethyan relying on the Pak-Aus BIT, have already escalated their disputes to ICSID tribunals.

However, it would not be prudent to suggest avoiding BITs, because it may raise foreign investors' concerns regarding the protection afforded to them and adversely affect the inward flow of FDI. Whatever has happened could not completely be attributed to the BITs but was due to executing BITs without meaningful negotiations in a haphazard manner, lack of negation skills, knowledge and knowhow. Negative and adverse outcomes and effects of BITs can be addressed by improving understanding about the latest development in treaty jurisprudence and correlating these with Pakistan's current and long-term needs.

Next chapter deals with emerging deterring factor; the judicial activism, its origin and development. It further discusses the judicial activism in context of Pakistan.

CHAPTER 5: JUDICIAL ACTIVISM: AN EMERGING DETERRING FACTOR

5.1 Introduction

The previous chapter elaborated the concept of BIT according to its significant features and applications. It further discussed the BITs executed by Pakistan in detail. This chapter covers debate on emerging deterring factor called ‘Judicial Activism’. The term “judicial activism” is often described by legal scholars as an act of the superior judiciary of the country where a court examines constitutionality, validity and legality of policies, actions and legislation of other organs of the State.

Pakistan has been experiencing an unprecedented wave of extreme judicial activism since the annulment of the privatization deal of Pakistan Steel Mills (“PSM”) in 2006. Expansion in constitutional fundamental rights (“CFRs”) and public interest litigation (“PIL”) has broadened the scope of judicial intervention in almost every matter. Frequent exercise of judicial powers, most specifically under *suo moto* jurisdiction, is seen to be taking over all sorts of matters, such as political, social and economic including matters related to foreign direct investment (“FDI”). Exercise of this authority as a routine matter raises serious questions about its constitutionality, effectiveness, desirability, as well as the sanctity of treaties and agreements executed by successive governments. Impacts of exercise of such powers on FDI related matters and the sanctity of investment treaties and commercial agreements signed by the Government of Pakistan (“GOP”) will also be investigated in this chapter. By examining the philosophy of judicial activism for countries administered under the written constitution e.g. Pakistan, USA and India this chapter will find difference between judicial activism and judicial extremism/interference.

Pakistan’s higher judiciary has handed down number of judgments under *suo moto* jurisdiction in the last decade through hearing of different substantial commercial matters by SCP. This chapter will examine the role of SCP in the cases of Pakistan Steel Mill, Rental Power Plant (“RPP”) and Reko Diq Gold and Copper Mines Cases. The exercise of *suo moto* jurisdiction by High Courts on PIL by hearing number of cases will also be analysed. To find the HCs ability to exercise *suo moto* authority previous judicial precedents handed down by the SCP and HCs in the last five decades will be examined.

Following the aims of the thesis, this chapter investigates the following questions:

1. Whether exercise of *suo moto* and original jurisdiction are within the scope, limits and boundaries drawn by the constitution?
2. ii. Whether the Superior and Higher Judiciary in Pakistan are exceeding its constitutional limits and encroaching upon the powers and authorities of other organs of the State?

The result of the above investigation will lead to the answer for the research question set out in the thesis on the desirability of judicial activism, the future of FDI and the sanctity of investment agreements and treaties signed by GOP.

5.2 Judicial Activism

Judicial activism has been selected as an emerging deterring factor which is likely to have long-lasting impacts on inward flow of FDI in Pakistan. Without any speculation, the judicial activism will set the fate of Pakistani nation in general including constitutional, commercial and FDI matters. Therefore, it is vital to examine historical background and development of judicial activism in other jurisdictions and then compare it with judicial activism in Pakistan.

5.2.1 Defining Judicial Activism

There is no single precise definition available for judicial activism; different definitions embody a range of concepts and its imperative such as invalidation of constitutional actions of other organs of the State, ignoring the principle of stare decisis, legislation by the judges, failure to adhere to principles of interpretive methodology and result-oriented judging.¹ It can be defined as “The judicial verdicts distrusted of being grounded on dogmatic and subjective considerations and deliberations instead of prevailing law and sometimes concluded as reverse of judicial restraint”. Judicial activism allows the judges to use their judicial wisdom to ensure justice at any cost with the application of subjective and objective tests.

Black’s Law defines judicial activism as “a philosophy of law-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.”

Judicial activism may denote the character of the higher judiciary whereby it surpasses the constitutional limits of exercising judicial authority on parliament's right to legislate.² The phrase may indicate that in judicial decision-making the judges apply their own wisdom preferably motivated by political views instead of preferring constitution, statute or judicial precedents.³

Generally, powers of the organs of the State are defined in the constitution. The constitution bestows upon the legislature the authority of law-making and the executive is empowered to implement the law and run the affairs of the government. To avoid any likely uncertainty on application of law and constitution, courts are delegated with the authority to interpret the constitution and statutes.⁴ However, where the legal provisions are clear, courts are required to deliver the judgments in accordance with the simple and literal meanings of the constitution and statute.⁵ Application of the simple literal meaning of the constitution and statute suggests working of the courts as courts of law.⁶ However, contrary to this common practice on certain events, sometimes courts react very actively and exercise their powers by expanding the scope of fundamental rights and public interest litigation. In this situation the courts act like court of justice where judges apply vast authority to interpret the law and relax the procedural rules and technicalities for dispensation of justice.⁷ Judges apply vast authority to interpret the constitution and statute to dispense justice in society. The situation where courts play an active role for

dispensation of justice by stretching the law beyond their constitutional authority is considered as judicial activism. In judicial activism courts work as courts of justice rather than courts of law.

The above discussed features suggest that, the proactive role of courts where decisions of judges about public policy are influenced by their own views together with other factors rather than the strict application of law may be deemed to be judicial activism. Black's Law Dictionary definition, referred above, has used the phrase 'a philosophy of law making' by the judges indicates the possibility of the law-making by the judges instead of mere interpretation of law. Consequently the process of decision-making and setting judicial precedents by preferring judicial wisdom over the strict application of law regarding public policy is termed as judicial activism. Allowing the judges to use their own wisdom and personal views seems to be influenced and motivated by the Latin term '*Fiat justitia ruat coelum*',⁸ ('Let justice be done if the Heavens fall'). In other words, justice should be done at any cost regardless of consequences. It may be argued that Courts are meant to ensure justice and the necessary outcome of judicial process must be provision of justice. Therefore, allowing judges to use their own judicial wisdom and views to pass over legal hurdles enables the courts to act as courts of justice and deliver what they are meant for which is nothing else except justice.⁹ Consequently, judicial activism is completely opposed to concept of the court of law which is meant to guarantee the strict and mandatory application of law although justice does not remain as the necessary outcome in every case.

Deviation from the common practice of law making by the parliament towards the 'philosophy of law making' by the judges was never been out of disadvantage. Allowing the judges to apply their own opinion and views gave rise to several controversies and uncertainties in society. It generated the debate on legality, desirability of judicial activism and certainty about enforceability of existing laws. It can be argued further that,

the delegation of the role of law-making to the judiciary may also result in a conflict of role and authority between judiciary, executive and the parliament.¹⁰

Undoubtedly several arguments in the favour of judicial activism and its benefits can also be brought forward. It can be argued that, in complicated matters simple application of law under its literal meaning would not serve the purpose to ensure justice. To address the legal complications and find the truth within the collection of several false and tricky matters judges are required to apply their judicial mind hence application of the judges' own mind cannot be called deviation from the common practice. Moreover, considering the specific circumstances of certain societies, a vigilant, authoritative and influential judiciary is vital. Due to illiteracy, poverty and lack of awareness about the citizens' rights, the privileged class attempts to stretch the laws in its favour. It fetches all the benefits through corrupt practices, mal-functioning and bad governance of executive. In the given scenario, the judiciary has to assert and play a proactive role to fill the vacuum, enforce the fundamental rights of citizens and curb the mal-practices.

5.2.2 Origin and development

In the international perspective, judicial activism is not a new phenomenon. Its history is spread over the centuries and various matters played a vital role in its growth. Its contributors include the State organs, the executives and the legislatures. Judicial activism finds and strengthens its roots in numerous events, such as violation of constitution and statutes, arbitrary and capricious acts or omissions, malfunctioning, corruption, nepotism, failure to perform etc. Nevertheless, in the context of Pakistan, judicial activism is quite a new phenomenon which has its own reasons and applications. The people do have a great deal of hope and expectation with the judiciary where other organs of State have failed to deliver, where legislation is privileged, discriminatory and ambiguous which provides a shield to corrupt practices.¹¹

Desirability and acceptability of the application of the judicial mind and wisdom upon PIL can be observed from the recent movement against corruption in India. The former justice of the Indian Supreme Court (“SCI”) V.R. Krishna Lyer is one of the big/hardliner supporters of judicial activism in the region; he once said, ‘The Judicial activism gets its highest bonus when its orders wipe some tears, from some eyes.’¹²

Urging the chief justice (“CJ”) of the SCI to use “judicial wisdom” to rescue India from corruption and the “mercy of high executives”, Justice Lyer addressed the CJ in these words, ‘*Dear Hon'ble Chief Justice of India, act now! Every hour is late. Every moment is late... I know if everyone protests against every authority there will be chaos but you must intervene and strike a balance using your judicial wisdom...*’¹³ A letter written by a former judge of the SCI to a sitting CJ maintains the strong assertion that, in countries like Pakistan and India people find the apex courts as the last resort against capricious and illegal acts of the privileged and ruling elite. The discussion over judicial activism requires serious consideration and elaborate discussion over judicial activism, its reasons and concerns coming out of its extreme exercise. For proper understanding of the philosophy of judicial activism, it seems essential to find its roots, origin and outcomes.

As said earlier, the higher judiciary is empowered to interpret the statute and constitution; hence, the judiciary is assigned a role of referee on the disputes between different organs¹⁴ of the State, between a State and its units¹⁵ and between individuals and State. To adjudicate such disputes, if otherwise not forbidden by the law, normally courts are constitutionally empowered to issue certain types of direction to act or restrain from

performing certain acts by means of writs of prohibition,¹⁶ mandamus¹⁷, certiorari¹⁸, habeas corpus¹⁹ and quo warranto.²⁰

Literature available on judicial activism by means of issuing such aforementioned writs and judicial review over the Act of parliament suggests that, it dates back to *Marbury v Madison*.²¹ In this case, John Marshal CJ of the US Supreme Court held that any act of the other branch of government which is contrary to the constitution is void. To determine the case, the three member bench of SC headed by CJ Marshal affirmed the supremacy of the constitution over all other laws of the country and held that all other organs are subservient to the constitution. It was declared mandatory for the legislature and executive to strictly observe the constitution violation of which would amount to betrayal from the real spirit of the constitution. Court declared that, to enforce the constitutional rights it had authority to issue writ of mandamus. However, the court found itself helpless to issue mandamus because petitioners claimed the right under section 13 of the Judiciary Act 1789 which itself had been declared unconstitutional.²² CJ Marshal categorically

stated that it is duty of the courts ‘to say what the law is.’²³ It was the first instance when any Act of the US Congress had been held unconstitutional and struck down by the SC.

The dictum laid down in the *Marbury* judgment provides a guideline for countries governed under a written constitution, such as Pakistan. CJ Marshal held that, ‘the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and that courts, as well as other departments, are bound by that instrument.’²⁴

Reacting to the judgment, President Jefferson claimed that the constitution did not empower the SC to decide the constitutionality of the legislation.²⁵ He asserted²⁶ that, assuming such authority by the judiciary would result in judicial dictatorship. By issuing mandamus, the judiciary was very likely to encroach upon Congress and executives in the near future. Conversely, Leonard Baker²⁷ appreciated the verdict saying that, by defining civil liberties the instant judgment established the rule of the law in the country and has provided the procedure of ‘settling the dispute without the sword’ hence the judgment should be admired. The *Marbury* judgment is the utmost achievement in civilisation to resolve conflicts fairly and without force. Likewise, William Rehnquist former CJ of the US Supreme Court called it “the most significant single contribution the United States has made to the art of government”.²⁸

The *Marbury* case strengthened the authority of the US judiciary to revisit the Acts of Congress and executives. The significance and contribution of the *Marbury* case in the development of law has not been overshadowed despite the elapse of 211 years. This case is presented as the judicial precedent in the USA and across the world equally, whenever controversy over the authority of court, parliament and constitution arises.

*McCullough v Maryland*²⁹ is another important case authored by CJ Marshall. It contributed significantly in the development of judicial authority to judge the constitutionality of an Act of the federal State, Congress and Federal Constitution. The SC held that the federal constitution was supreme and rejected the assertion of the State of Maryland that States were sovereign because the constitution was ratified by the State Conventions. The judgment invalidated the statute passed by the State of Maryland for imposition of tax on the Federal Bank. In the unanimous decision (7-0) authored by CJ Marshall, the court revisited the judgment of the Court of Appeal by interpreting the scope of the implied powers³⁰ under the Necessary and Proper Clause of Article I, Section 8 of the Constitution.³¹ It was held that under the constitution, the State of Maryland did not have the right to impose a tax on the Federal Bank, hence the Act of the federal State was unconstitutional. The court emphasised and vehemently asserted that Acts of the executive and legislators should meet the strict requirement of the constitution. It was held that: “let the ends be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”³²

The instant judgment reaffirmed the judicial authority to interpret the constitution broadly and examine the constitutionality of Acts and statutes under question. It also extended judicial support to uphold the supremacy of an Act of Congress over an Act of a federal State when both conflict with each other. The authoritarian role of the judiciary did not end with CJ Marshall; the US Supreme Court continued judicial scrutiny on the actions of Congress and executives whenever it appeared to them contrary to the constitution. Not only in the nineteenth but also in the twentieth and twenty-first centuries, the US Supreme Court kept examining constitutional disputes and adjudicated.

In *Brown v Board of Education*,³³ the US Supreme Court abolished the segregation of schools between blacks and whites. It was a consolidated judgment on the various petitions filed by black students of the States of Kansas, South Carolina, Virginia, and Delaware. The petitioners claimed the right to admission and asserted that segregation was contrary to the Equal Protection Clause of the Fourteenth Amendment of the constitution. The petitioners as well challenged the doctrine of ‘separate but equal’ adopted in *Plessy v Ferguson*.³⁴ The unanimous decision (9-0) authored by CJ Warren rejected *Plessy v Ferguson*.³⁵ It was held that ‘separate but equal’ schooling on a racial basis is contrary to the spirit of the equal protection clause of the constitution, hence is unconstitutional. The *Brown* case ensured the enforcement of the 14th amendment of the constitution with its full letter and spirit for first time, 86 years after its enactment in 1868. This judgment laid the foundation for the promulgation of the Civil Rights Act 1964 in the USA in just ten years.

The verdict in *Brown v Board of Education* suggests that sometimes courts may well play a supporting role to the government by stepping in actively. It can rescue the government

from fear of political reaction, resentment and undue influence of political, social and economic pressure groups on enacting or abolishing certain laws.

In its latest judgment in *Citizens United v Federal Election Commission*,³⁶ the US SC with split decision (5-4) reaffirmed its authority to revisit any policy or legislation enacted by the Executive or Congress. The court found it illegal and contrary to the first amendment of the constitution to prohibit corporations to finance political campaigns. The SC held that under the first amendment of the constitution corporations and unions have rights equal to individuals. Therefore, federal statute debarring them from utilising their general funds for the election campaign of the candidate of their own choice is unconstitutional and illegal. The judgment as well overruled earlier judgments³⁷ regarding provision of election funds.³⁸ US President Obama showed his displeasure on the verdict and called it victory of Wall Street.³⁹

A very hotly debated verdict in *National Federation of Independent Business v Kathleen and Secretary Health*⁴⁰ came into the limelight in the recent judicial history of the USA. In this case, twenty-six federal States along with several individuals challenged the constitutionality of the health care law Patient Protection and Affordable Care Act 2010 and ‘individual mandate’ and sought for the writ of certiorari. The law obligated the majority of US citizens to buy health insurance or pay a fee, the ‘Shared responsibility payment’, from 2014. Chief Justice John Roberts authored the majority judgment declaring the statute partly within the scope of the taxation authority of Congress. The court disagreed with the statute Patient Protection and Affordable Care Act 2010 to the

extent of mandating the States to expand the Medicaid programme, failure to which the State would lose all of their funding for Medicaid.⁴¹ The Court held it constitutional to withhold Medicaid funding of Federal States on failure to accept the terms of the Medicaid expansion scheme.

In the instant judgment, the court showed great judicial wisdom by exercising its judicial review authority and judicial restraint simultaneously. The court showed judicial restraint by refusing to interfere in Congress's right to levy the tax and upheld the statute partly within the scope of the taxation authority of Congress. It was held that, the right to impose tax rests with Congress and courts do not have any right to judge the wisdom of Congress. It is not duty of the courts to prevent Congress from exercising its constitutional authority. At the same time by rejecting the part of the legislation which deprived the States from funds on failure to extend the program, the court reaffirmed its authority to revisit Acts of Congress. Regarding individual mandate, CJ Roberts held that 'the individual mandate is not a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause.'⁴²

CJ Roberts, and Justices Breyer and Kagan found that threatening the States to deprive them from their funding is a violation of the constitution.⁴³ By partly upholding the legislation in question, the court considered the view taken in *Ayotte v Planned Parenthood*.⁴⁴ In *Ayotte*, it was held that, while dealing with unconstitutional legislation the interpretation of the court should attempt to save the legislation rather than destroy it.

As discussed above, the judgment speaks for the wisdom of the court from various angles. On one hand, showing judicial restraint it describes the court's limitations to interpret the

law and judicial authority over Acts of Congress. On the other hand, it demonstrates the court's obligation to decide the constitutionality of certain Acts and legislation. Following judicial restraint, the court interpreted the statute in a manner to save it. The court observed that:

“Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.”⁴⁵

However, while dealing with the question of legality of individual mandate, the court followed the dictum laid down in *Marbury v Madison*. The court emphasised its authority to enforce the constitutional limits of the federal government and Congress by restricting them from exceeding their constitutional limits.⁴⁶ Despite judicial restraint and due respect to Congress, the court found nothing which restrains judges from enforcing the constitution with its full force. It was held that:

“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed...When we invalidate an application of a statute because that application is unconstitutional, we are not ‘rewriting’ the statute; we are merely enforcing the Constitution.”⁴⁷

The above discussion reveals that the apex court always exercised its judicial authority on the formal written petition of the aggrieved party. An act of Congress or the Executive is subject to the constitutional petition of either individuals or federal States seeking for

issuance of writ. The nature of the disputes relates to the constitutionality of the legislation, acts or omission of executives and Congress. While dealing with the constitutionality of any act of the Executive, Congress or statute courts seemed to endeavour to save the legislation though partially rather destroying the legislation as a whole.⁴⁸ The US SC played a significant role in defining constitutional limits between Federal government and federal States.⁴⁹ It enforced CFR provided in the constitution by declaring Acts of Congress illegal.⁵⁰ The courts as well seemed to avoid interfering in the authority of other State organs. It played a supportive role to rescue the government and Congress from acts which were otherwise impossible due to political, social and commercial reasons.⁵¹ Acts which had political implications were left for political decision and wisdom of the people, however wherever clear violation of the constitution was found the courts stepped forward to uphold the supremacy of the constitution.⁵² In a nutshell, the role of the US Supreme Court appears to be as custodian of the constitution and supportive to Congress and the Executive simultaneously as a court of law rather than a court of justice. After examining some important cases of the US constitutional history it is significant to investigate role of the Pakistani judiciary and find its distinguishing features.

5.3 Judicial Activism in Pakistan

The SCP has given a new meaning to PIL and extended its scope by establishing the Human Right Cell (“HRC”) in the SCP in 2004 which used to receive approximately 500 applications every day. Directions of the SCP passed on the applications received in HRC

intensified relationship between judiciary and other organs of the State and later gave rise to the judicial activism. Relationship between judiciary, executive and legislature further aggravated when executive authorities attempted to establish writ of government. To establish control over the affairs of the government the President of Pakistan who was Chief of Army Staff (“COAS”) too sack the Chief Justice of Pakistan (“CJP”) on 9th March 2007. Decision to sack the CJP met with grave resentment by the lawyer community, civil society, media and political parties. They started restoration of CJP movement on one hand and on other they challenged this decision in the SCP. The CJP was reinstated by the 13-member bench of the SCP through its judgment dated 20 July 2007.⁵³ Thereafter, following the emergency order dated 3 November 2007, judges of the superior judiciary including the CJP who refused to take oath under the Provisional Constitutional Order (“PCO”) of the army chief were sacked again on this date. Later on, as a result of the second phase of nationwide restoration of the judiciary movement and long march, the GOP reinstated the judges of the superior judiciary through an executive order dated 16 March 2009. A debate on these cases and actions will be carried out in upcoming paragraphs.

After the restoration of the Chief Justice of Pakistan (“CJP”)⁵⁴ and other judges of superior judiciary, the SCP and the High Courts (“HCs”), judicial activism was at its highest level. After reinstatement of the judges of the superior courts of Pakistan in March 2009, the HRC received 139,906 applications in just two years (until February 2011). The SCP granted relief on 85,489 applications by seeking reports from the relevant departments, whereas the CJP entertained 87 Human Rights and PIL matters directly in the SCP.⁵⁵ During the current phase of judicial activism, the SCP has exercised its *suo moto* and original jurisdiction on the matters ranging from minor issues such as the price of daily commodities, crime investigation and posting and transfer to the disqualification

of Prime Minister, annulment of constitutional and statutory provisions and commercial contracts involving FDI. Participation of lawyers, the role of civil society and the media in restoration of judiciary movements, firstly in 2007 and secondly in 2009⁵⁶, demonstrate their confidence in the higher judiciary. Their unconditional support for the higher judiciary shows the significance of judicial activism in the socio political milieu of Pakistan.⁵⁷

Supporters of PIL under *suo moto* and original jurisdiction of SCP argue⁵⁸ that PIL serves the purpose of enforcement of constitutional rights and rule of law, hence, it is required to be developed more in present circumstances. It is a beneficial and effective tool not only for the dispensation of justice but also for easy access to justice for the poor and marginalized fraction of Pakistani society which is devoid of cheap and speedy justice on its doorstep. The PIL helps to fill the gap between the poor and elite classes in relation to knowledge and power structure. This factor amongst others supports the ‘gradual shift from the mechanical justice to human welfare justice’.⁵⁹ It is further argued that other organs of the State have lost their credibility and the trust of the people and only the superior judiciary has succeeded in restoring its authority by means of PIL. It also helps to control the persistent tradition of misuse of authority by the government and its officials to violate the constitution, law and rules, and infringe upon the CFR of the weakest class of citizens.⁶⁰

The distinguishing feature of judicial activism in Pakistan is *suo moto* jurisdiction, whereby the courts⁶¹ take notice and cognizance of a specific matter involving public interest or CFR on their own motion without any formal petition. Courts are seen to be taking *suo moto* notice on news items in the electronic or print media, personal observation or knowledge and on demand of civil society or non-governmental organisations (“NGOs”). Courts convert a simple application into a petition by ignoring any procedural requirement and may summon the State’s functionaries, requiring them to appear before the court and to respond to such application.

The SCP frequently invokes its *suo moto* and original jurisdiction for hearing political, social, economic, human rights and constitutional issues.⁶² There is an extensive list of the cases heard by the SCP in just a few years indicating the extreme use of the original and *suo moto* jurisdiction. The SCP seems to be exercising its authority over those matters which in the normal course of procedure fall under the prerogative of the executive and legislative organs of the State. By exercising powers conferred by Arts 187⁶³ and 190⁶⁴ of the constitution, the SCP also issued directions to the authorities concerned to implement its orders. Naming a few among several, the SCP took notice of the import of poultry feed containing pig meat and ordered the destruction of the entire consignment, took strict action against those responsible and also took an undertaking from the importers and authorities concerned to be vigilant next time.⁶⁵ The SCP ordered the cancellation of the lease given to McDonald’s restaurant established in F/9 public park,

Islamabad, as well as Hot Shot bowling club.⁶⁶ Similarly, the SCP gave its verdict against projects damaging to the environment, such as Margala housing society, Islamabad chalets and Pir Sohawa valley villas,⁶⁷ declaring the New Muree City project fatal to the environment, hence illegal, as it was intended to cut forest trees spread over thousands of acres.⁶⁸

The SCP has been found exercising its authority more rigorously since 2009. It would be correct to suggest that after restoration of the CJP and other sacked judges, the second phase of the restored judiciary is enjoying the height of judicial activism. Distinct from the first phase of judicial activism, on this occasion, the SCP and HCs⁶⁹ have furthered the scope of PIL and enforcement of CFR. The courts heard a variety of cases by expanding its jurisdiction, involving corruption⁷⁰ such as pilgrimage arrangements, the so-called Hajj scam,⁷¹ the Bank of Punjab scam⁷² and NICL scam.⁷³ Appointments,⁷⁴

postings, transfers and promotion of public officers⁷⁵, senior bureaucrats,⁷⁶ transfer and appointments of investigation officers (“IO”) of important cases,⁷⁷ levy of carbon and general sales tax,⁷⁸ contracts awarded by government bodies such as the Capital Development Authority (“CDA”),⁷⁹ fixing the sugar price,⁸⁰ fuel, gas, and electricity⁸¹ on several occasions⁸². The SCP as well took cognisance on the law and order situation in the city of Karachi⁸³ and the province of Baluchistan. The SCP held the provincial and federal governments responsible for bloodshed in Karachi and found that some political parties have their militant wings and these are involved in target killing and extortion.⁸⁴ Proceedings and verdicts in such cases will have long-lasting implications.

The nature of aforementioned cases indicates that rather involving question of law, constitutionality or legality of the impugned act, majority of these decisions were against the executive orders or policy decisions of the political executives and bureaucratic State officials. Matters involving levy the taxes, fixing prices of commodities such as sugar, oil and gas, fixing transport fare, posting, transfer and promotion of government officers are admittedly prerogative of government. These matters fall under political decision making of the government hence do not warrant direct involvement of the SCP. The remedy rests with the people of Pakistan, if they disagree with such governmental decision they may vote against the ruling party in next election and throw them out of government. Involvement of the SCP in the matters having political implications could be considered as judicial interference rather judicial activism because it causes delay in hearing of regular appeals pending before SCP, hence discourages the mechanism of legal proceedings prearranged in the constitution. Besides, judges do not assume responsibility of negative outcome of such decisions as they lack expertise to foresee impact of their direct involvement, thus political government is required to bear the negative consequences of such decisions. This argument gets support from investigation conducted in 5.2.2 on Origin and development of judicial activism wherein judicial activism in USA has been examined.

It is pertinent to reiterate that Pakistan and USA both are governed under written constitution and all the organs of the States including judiciary derive their powers from the constitution. However, comparison of abovementioned cases heard by SCP and USA Supreme Court reveals the US Supreme Court as fairly different from the SCP. The US Supreme Court appeared to be more supportive and self-restrained whilst examining the legality and constitutionality of the act of Executive and Congress. It avoided interfering in the authority of other State organs and played

a supportive role to rescue the government and Congress from acts which were otherwise impossible due to political, social and commercial reasons.⁸⁵ It showed judicial restraint unless a clear violation of the constitution was found. Acts which had political implications were left for political decision and wisdom of the people.

In *National Federation v Secretary of Health and Human Services*⁸⁶ CJ Robert clearly observed that, the Supreme Court has power to interpret the law but judges neither have expertise nor any right to make policy decisions. Therefore, such authority is given to elected leadership of the country and people have every right to throw them out of the government if they don't like policies of the government. CJ Robert further observed that, it is not job of the judges to protect the people from impacts of their political decisions.

Besides, above discussed cases involving administrative and political matters, the SCP also heard several cases involving constitutional matters and questions. In the *National Reconciliation Ordinance ("NRO")* case,⁸⁷ the SCP annulled the NRO from the date of its promulgation by declaring it void ab initio. The SCP directed the government to write a letter to Swiss authorities to reopen corruption cases against sitting President of the country who was also co-chairman of ruling party i.e Pakistan Peoples' Party Parliamentarian ("PPPP"). The PPP lead government did not write the letter against President of State and its party chief despite having several opportunities from SCP. During miscellaneous proceedings and taking *suo moto* notice⁸⁸ regarding implementation of NRO judgment, the SCP charged the then PM for contempt of court. The SCP considered PM's denial to write said letter as ridiculing the apex court amounting to contempt of court. Afterwards, vide its order dated 26 April 2012, the SCP sentenced the elected Prime Minister by declaring him guilty of contempt of court under Contempt of Court Ordinance 2003 and Art 204 of the constitution.⁸⁹ Reacting on SCP's verdict the law minister contended that despite this sentence the PM would continue to hold his office as it is prerogative of the Speaker of the National Assembly to decide the

fate of the Prime Minister and not the SCP.⁹⁰ Later on, the Speaker National Assembly gave her ruling and held that, the PM may continue to hold his office as he cannot be disqualified under Article 63(1)(g) of the constitution. She was of the view that no question of PM's disqualification arises at all therefore she refused to forward PM's disqualification reference to the Election Commission of Pakistan ("ECP"). Pakistan Muslim League (Nawaz) ("PMLN") and other opposition parties challenged said ruling in the SCP. During the course of proceedings the Attorney General argued that, the constitution grants immunity to PM and except parliament this immunity could not be withdrawn by any institution including SCP therefore the PM is not answerable to SCP. He further argued that, the independence of the judiciary will be questioned if it hears such politically motivated petitions. If the SCP turns down the ruling of the Speaker then parliament is empowered to disown the SCP's verdict which will led to conflict between organs of the State. However, by order dated 19 June 2012 the SCP rejected the ruling of the Speaker and sacked the PM from the date of his sentence, 26th April 2012. The SCP directed the ECP to de-notify the name of PM and also directed the president to summon National Assembly for election of new PM.⁹¹ Though, the judgment was largely welcomed by the opposition parties but it intensified the prevailing conflict between executive, legislature and judiciary which will be further explained below.

Prior to this, the SCP while dealing with another constitutional matter declared the Proclamation of Emergency Order ("PCO") of 3 November 2007 as void and in violation of the constitution.⁹² It is worth mentioning here that through said PCO, Army chief announced emergency in the country and required all judges of the SCP and HCs to take a fresh oath on PCO instead of constitution. The CJP and some 42 judges were sacked and detained at their home on refusal to take oath on PCO. Detention and removal of senior judges procreated another successful movement for restoration of judiciary movement which further strengthened the judicial activism. Through PCO annulment

verdict, on the matter of the appointment of new judges in the SCP and all HCs by emergency order, the SCP sacked some 110 judges of the SCP and HCs at once who took an oath on the PCO. On the question of '*salus populi est suprema lex*: doctrine of necessity' which was previously used to provide shelter to all military takeovers the SCP observed that it was '*neither just nor fair nor legal and was violative of the Injunctions of Quran... Doctrine of necessity is neither Law nor any rule nor regulation. It is a state of affairs where, in the given circumstances, unfair is justified in the name of expediency..*'⁹³

It has been noted above that the assertive role of apex judiciary on variety of matters including administrative and political issues was further bittering the current distressed relationship between judiciary and other organs of the State. Therefore, in order to strengthen the parliament and to reinforce control of the executive over the affairs of the State, parliament unanimously passed 18th amendment in the constitution. By means of 18th amendment, parliament changed the procedure of the appointment of the judges in of the HCs and SCP. Parliament had been given primacy in appointment of judges of superior judiciary and authority was assigned to a parliamentary committee established for this purpose. Parliament deemed it as its democratic and constitutional prerogative and in accordance with the principle of parliamentary supremacy and sovereignty. It was argued that the constitution itself gives protection to the act of the parliament hence it is not open for the judicial review. Conversely, judicial activists and supporters of judicial activism⁹⁴ treated it as an attempt to curtail the powers of judiciary and violation of the principle of supremacy of the constitution. It was asserted that new procedure for appointment of judges is against the principle of trichotomy of power and independence of judiciary guaranteed in the constitution.

The legal debate on parliament's power to legislate and amend the constitution has always seen to be surrounding lot of controversies. Constitution of Pakistan Art. 238 and 239 deal with the issues concerning to constitutional amendment. The Art 249(5-6) provides;

239(5). No amendment of the Constitution shall be called in question in any Court on any ground whatsoever.

(6). For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.

The above referred provisions provide that the parliament is sovereign to amend the constitution according to its sweet will and there is nothing contained in the constitution which restrict the authority of the parliament except provided in sub clause 4 which relates to the change in the boundary of the provinces. *“Phraseology of provisions discussed above especially sub-clause (6) is fairly clear enough and shows the will of the creators of the constitution to confer powers upon the parliamentarians to amend any provision of the constitution. Had they wanted to exclude or impose any limitations on parliament to amend the constitution they would have categorically mentioned it, as is seen in Art. 239(4)”*⁹⁵

Controversy over the supremacy of parliament and constitution reached at its peak when several petitions were filed in the SCP under its original jurisdiction challenging the 18th amendment in the constitution.⁹⁶ Among several other provisions, Art 175 A regarding appointment of the judges was said to be violative of the basic structure of the constitution as independence of judiciary is one of the salient features of the constitution. The SCP headed by the CJP observed⁹⁷ that the SCP has time and again acknowledged the salient features of the constitution. The SCP would refrain from giving its final verdict on the merits of the case at this stage prefers to defer the matter for reconsideration of parliament in accordance with the direction of the SCP. The SCP adjourned the proceedings and decided to take up the matter for final verdict at later stage. Most importantly court observed it is creature of the constitution which is based on tricotomy of the powers and functions of the all the organs of the State is pre-

determined. Although the people being political sovereign, trusty of the sacred constitution and power had not made the judges ultimate authority however, **“But they** wanted the Judges to do “right to all manner of people according to law, without fear or favour, affection or ill-will ... Judicial independence is one of the core values of our Constitution because it is inextricably linked with the enforcement of fundamental rights [Article 184 (3) and Article 199 of the Constitution] and the rule of law.”⁹⁸

The SCP emphasized on independence of judiciary as one of the salient feature of the constitution hence appointment of the judges should be in the line of idea of independence of judiciary and tricotomy of power. The SCP instead of handing down its verdict referred the matter to parliament with its recommendation to amend the Art 175A of the constitution following the court’s term in *“the light of the concerns/reservations expressed and observations/suggestions.”*⁹⁹

The SCP instead of giving final verdict had merely adjourned the proceedings and referred the matter to parliament for reconsideration in the light of aforementioned observations of the SCP. Once again, electronic and print media largely welcomed and appreciated the order and wisdom of the SCP in customary manner.¹⁰⁰ On receiving the reference from the SCP the parliament followed the direction of the SCP in its entirety and passed the nineteenth amendment. Parliament accepted the CJP and SCP’s decisive role in the appointment of the judges in the higher judiciary. The way parliament acted in compliance of said reference clearly demonstrates that parliament was not unmindful of the fact that the SCP has not left its recommendations at the wisdom of the parliamentarians. It merely adjourned the proceedings and kept the right of final decision in its hands. Construction of observations made in paragraphs 8 to 10 clearly indicates the SCP’s intention to deviate from its longstanding position on constitutional amendments wherein the SCP time and again held that; the constitution is based on

tricotomy of power theory and amendment in the constitution is prerogative of the parliament.¹⁰¹ It is purely a political matter which requires being resolved on political forum e.g parliament and fair general election therefore act of the parliament is not open for court's intervention. "The SCP by means of its observation made in paragraphs 8 to 10 conveyed its message to the parliament that it would not be reluctant to overrule the constitutional amendments on the ground of several time rejected basic structure theory. This reveals that if in the future the SCP is displeased on any constitutional amendment it is very likely to strike down the same being contrary and violative to the basic structure of the constitution theory."¹⁰²

Following the disqualification of PM Gilani parliament elected his successor PM who had to encounter the same situation. The SCP also summoned him for implementation of its orders and writing a letter to Swiss authorities against then sitting President. In order to avoid disqualification of another PM and to protect other senior political office holders the parliament enacted Contempt of Court Act 2012 ("CCA") which was supported all major parties sitting in the parliament. The CCA aimed to grant immunity to the President, PM, Governors and other senior officeholders against contempt of court proceedings. However, the SCP once again demonstrated its assertive and decisive rule in parliamentary legislation process and did not take the CCA kindly. The five member bench of the SCP headed by CJ Chaudhary examined the constitutionality and legality of the Act of the Parliament and observed the constitution empowers¹⁰³ the SCP and HCs to sentence anyone committed contempt of court. The legislative powers of parliament conferred in clause 3 Art. 204 relate to standardise the exercise of the powers of the court and not to create defences for contempt of court. Besides, the CCA amounts to curtailing the powers of the court and amending the constitution in violation of procedure prescribed

in Art 238 and 239 of the constitution. Therefore, the CCA is declared to be unconstitutional and void since day of its enactment. 104

Before eighteenth amendment and CCA annulment case perhaps it was easy to say that, constitution of Pakistan is not a rigid constitution. There is no confusion on parliament's authority to pass any amendment and judicial precedents were also consistent on this point.¹⁰⁵ However, after aforementioned judgments the ability of the parliament to amend the constitution in a manner to curtail the powers of the higher judiciary or oust the jurisdiction of the SCP appeared to be impossible. Aforementioned judgments demonstrate that, such act or attempt will be subject to the judicial review and is very likely to be struck down by the SCP.¹⁰⁶

Like abovementioned corruption, constitutional, administrative and political matters the SCP also dealt with commercial matters in the Steel Mills privatisation case, Rental Power case along with miscellaneous proceedings for implementation of this judgment¹⁰⁷ and the Reko Diq gold and copper mine case. Verdicts in these cases directly relate to GOP's international and treaty obligations regarding protection of FDI, therefore it is vital to study these cases and investigate the effects of judicial activism on FDI in Pakistan.

5.4 Significant Commercial Matters heard by the SCP

Besides above discussed constitutional matters, during the era of judicial activism the apex judiciary of Pakistan took suo moto action and has also exercised its original jurisdiction to entertain number of petitions filed against mega commercial deals. The SCP scraped multibillions' commercial accords and pledges between GOP and foreign investors without taking into the account the commercial and legal consequences and impacts of its verdicts. Some of these verdicts have set foundation for foreign investors

to recourse to foreign jurisdictions against Pakistan on one hand whereas on other, caused huge delay in completion of such projects. Three important cases along with facts, rationale, outcome and aftermaths are investigated below.

5.4.1 Privatisation of Pakistan Steel Mill

Privatisation of Pakistan Steel Mills (“PSM”) was the first major and important case,¹⁰⁸ which drew the attention of the entire country in 2006, and since then high profile cases against executives were very frequently taken up by the SCP.¹⁰⁹ The privatisation of PSM deal involved US\$362 million inward FDI supposed to be paid as a winning bid and an additional US\$250 million that the investor pledged to invest in the project.

It may be correct to suggest that the PSM case was the beginning of the era of judicial activism in Pakistan. In the instant judgment, the larger bench of the SCP cancelled the US\$362 million bid for privatisation of PSM. In its unanimous verdict, the SCP exposed a number of legal violations, lapses, omissions and commissions by the Privatisation Commission and the Cabinet Committee on Privatisation. It was believed¹¹⁰ that the SCP’s judgment saved Rs.18 billion loss and Rs.33.67 billion extra benefit to the bidder. However, this saving was proven a shallow and temporary saving when the succeeding government announced the loss of Rs.23 billion in PSM during the first financial year of the new government.¹¹¹ According to the report¹¹² published in the Pakistani daily *Dawn*, until 31 October 2012 despite the Rs.14.6 billion bailout package given by GOP, the liability of payable debt of the PSM has exceeded Rs.82 billion. The judgment as well

discouraged both the US\$362 million inward FDI winning bid payment and the additional US\$250 million investment pledge.

It is worth mentioning here that during 2007-08, PSM earned Rs.2.3 billion profit despite having Rs7.0 billion debt liability.¹¹³ Referring to the papers on the performance of Pakistan Steel Mills the abovementioned *Dawn* report revealed that production of Pakistan Steel dropped to 6% from 92% in April 2008 when the new democratic government was sworn in. The report suggests that since annulment of its privatisation by the SCP the PSM has suffered Rs.79 billion loss until October 2012. Once again, the SCP has taken *suo moto* notice¹¹⁴ on such reports of massive corruption and mismanagement in PSM.

The aftermath of the annulment of the privatisation deal by the SCP suggests that PSM earned and saved nothing, and instead caused a loss and massive decrease in production which has been continuously borne by the poor nation. By putting international relations at stake, the PSM judgment as well sacrificed millions of dollars of FDI on one hand and left question mark against the credibility and reputation of GOP on the other hand. Further to its judgment, the SCP has sacrificed much time on subsequent corruption matters relating to PSM, but despite continuous hearing, no improvement in its affairs has been seen yet. Had the SCP not involved itself in such commercial matters, it could have used its precious time, wisdom and energy on regular cases for better dispensation of justice in society. The interference of the SCP in the PSM privatisation has benefited society much less than it lost in terms of FDI, international relations and credibility and negative financial outcomes.

5.4.2 Rental Power case

Another significant case which would have long lasting impact on Pakistan's political, commercial and international spheres is the Rental Power ("RPP") case.¹¹⁵ The Rental

Power case has affected GOP's ability to execute commercial contracts and agreements as it allowed nineteen power companies to generate electricity. The majority of the companies were foreign nationals who were supposed to spend billions of dollars on electricity generation in Pakistan. Therefore, the case raises several questions about GOP's treaty obligations towards companies and investor nationals of the States having BITs with Pakistan.

In its most-awaited judgment in the RPP case, the SCP invalidated the rental power projects in Pakistan by pointing out massive corruption, bribes and kickbacks. Consequently, the SCP held all the rental power agreements illegal and void ab initio. The SCP passed an order for initiating immediate criminal action and recovery of the entire amount already paid for these projects with interest.¹¹⁶ RPP's case proceedings have been initiated on the demand of one parliamentarian¹¹⁷ who urged the SCP to take *suo moto* notice on alleged corruption worth US\$5 billion for awarding RPP projects to generate electricity in Pakistan.¹¹⁸ The CJP held that, the constitution requires running the government through its elected representatives and obligates them to accomplish their duties with the greatest capacity, honesty and faithfully in accordance with the constitution, law and rules of assembly. It has binding force on the parliamentarians to always uphold the 'sovereignty, integrity, solidarity, well-being and prosperity of Pakistan' and preserve it against any likely threat.

The SCP found that an increase in advance payments paid by the GOP to RPPs as bidders for power generation from 7% to 14% ran to billions of rupees and was not free of illegalities on the part of government. The CJP held that said increase was unacceptable without calling fresh bids to ensure the fair competition among the bidders.¹¹⁹ The court

observed that despite spending billions of rupees and granting special incentives, such as exemption of custom duty, relief in withholding tax etc, these power companies badly failed to produce the required amount of electricity. Consequently, the SCP found the RPPs as a complete failure and contrary to Arts 9 and 24 of the constitution. Moreover, RPP projects were held to be violation of section 7 of the Transmission and Distribution of Power Act 1997 (“TDPA 1997”) which categorically obligates the National Electric Power Regulatory Authority to protect the interests of its customers.¹²⁰

RPPs’ tariff for electricity generated by them was very high, thus found as violation of the direction of the Economic Coordination Committee (“ECC”) dated 10 September 2008. The per unit cost agreed with these power companies varied from Rs.35 to Rs.50, very much higher than the per unit tariff set by the Independent Power Plants (“IPPS”). The ECC direction sought to ensure that in the first ten years the RPPs generate electricity more cheaply than the IPPs.¹²¹ For these reasons, amongst others, the SCP held that, all the relevant governmental authorities and Ministers for Water and Power in whose tenure the RPPs agreements were signed (2006 to 2008) were responsible for the violation of principles of transparency. Their involvement in corrupt practices and corruption and deriving financial benefits from the RPPs was very likely, hence the National Accountability Bureau (“NAB”) was directed to take action against them¹²² under National Accountability Ordinance 1999 (“NAO 1999”). Due to prima facie involvement in corruption and corrupt practices all the officials of the Pakistan Electronic Power Company (“PEPCO”), Central Power Generation Company Ltd (“GENCO”), National Electric Power Regulatory Authority (“NEPRA”) and their sponsors who were involved

in deriving financial benefits from the RPPs were held accountable for civil and criminal actions simultaneously.¹²³

5.4.2.1 Subsequent proceedings in the RPPS case

Subsequently, regarding implementation of paragraphs (iii), (ix) and (x) of the judgment in the RPP case, the SCP noticed wilful reluctance on the part of the NAB authorities. The SCP held that reluctance in obeying this order was a clear violation, hence is proceedable under the Contempt of Court Ordinance 2003 and Art 204 of the Constitution of Pakistan. Therefore, the SCP issued contempt of court notices to the Chairman of NAB and others.¹²⁴ The SCP as well passed an order on 8 November 2012 against one of the RPPs, namely “Karkey”, a Turkish company operating a power generation facility situated on a barge, restraining the barge from sailing out of Pakistani waters without clearing the outstanding dues against it. Despite said restraining order of the SCP, the Karkey had been allowed by the NAB authority to sail out of Pakistan without effecting recovery of outstanding amount. Perceiving the situation, the SCP held that responsibility would lie with the Chairman of NAB if Karkey’s ship sailed out of Pakistan without effecting the recovery.¹²⁵ During the course of hearing of the implementation of the RPP case on 15 January 2013, the SCP ordered the NAB authorities to arrest all those responsible for the RPP scam, disregarding their rank or authority. The names of those responsible included the then-incumbent Prime Minister of Pakistan and twenty-seven others. The order further provides, if anyone left the country, the Chairman of NAB would have to assume responsibility.

At this stage, some serious concerns and reservations of NAB authorities over the continuous orders of the SCP was seen. The Prosecutor General of NAB vehemently objected to the jurisdiction and authority of the SCP to interfere in the investigation or check investigation record. He firmly asserted that the SCP lacked the authority. Besides

this, the Chairman of NAB, being frustrated of the continuous orders of the SCP, wrote a letter to the President of Pakistan¹²⁶ claiming that the SCP's role was clouded with political motivations in this matter. Moving one step forward, he stressed that the SCP's pressure and actions amount to pre-poll rigging and was very likely to hamper the independence of NAB officials from conducting the investigation transparently and without undue influence. He emphasized that by frequent exercise of *suo moto*, the SCP has diverted itself from its prime role as the final appellate and constitutional court. In his letter, he called the *suo moto* jurisdiction an open licence to undermine the government. He maintained that by relying on contempt law, street power of lawyers and violating the code of conduct, the SCP is rapidly losing its moral credibility. Taking notice of these allegations, the SCP ordered the initiation of contempt of court proceedings against the NAB chairman and directed to produce a true copy of said letter in the court.¹²⁷

5.4.2.2 Outcomes of the RPPs Case

The RPPs judgment will have long-lasting economic, international, constitutional and political outcomes on Pakistan. The instant judgment highlighted RPPs as symbol of corruption and abuse of powers by executives and saved billions of dollars which was very likely to be looted through this deal. It has also effected recovery of advance payment and interest amounting to PKR8,689,224,000 from the power companies. In addition, in compliance with the judgment, recovery of PKR445,496,000 from companies Young Gen and the interest from Reshma would also be effected.¹²⁸ The judgment also saved significant foreign exchange and money which was likely to be milked from the poor people as unprecedented, high tariff.¹²⁹ Such a high electricity tariff would also

increase production costs; consequently, all type of domestic and export industries of the growing economy were prone to negative impacts.

On the other hand, some negative outcomes of the exercise of *suo moto* jurisdiction can also be observed. The senior judicial officer, the Prosecutor General of NAB, objected to the authority of the SCP to interfere in the investigation, whereas the senior government officer highlighted its drawbacks by questioning the SCP's *suo moto* authority.¹³⁰ Showing the reservation and resentment over the SCP's authority in writing, the senior officer alleged that unnecessary interference of the SCP might hamper free and transparent investigation.

This proactive role of the SCP has become a matter of interest for national and international researchers and organisations, equally. Reacting to an order of the SCP to arrest the PM and twenty-seven others in the RPPs scam, the Asian Human Rights Commission ("AHRC") showed its reservation s over the authority of the SCP to supervise the investigation. AHRC called it contentious, particularly regarding due process and rule of law and Right to Fair Trial under Art 10-A of the constitution.¹³¹ AHRC indicated that extreme exercise of judicial authority would generate political friction in the country which would cause harm to Pakistan and its citizens, greater than the benefit derived from such actions. AHRC further said that SCP's interference in the investigation violates Art 9 of the constitution¹³² and is contrary to the dictum laid down in *Jogindar Kumar's* case.¹³³

It is worth mentioning here that in compliance with the SCP judgment, the Turkish firm Karkey initially signed an agreement with NAB to settle its accounts, but later on Karkey

refused to accept the SCP's ruling in the RPPs case, intending to seek international arbitration against GOP. Through the legal notice issued to the Pakistani government on 19 May 2012, Karkey demanded to stop the inquiry initiated by the NAB authorities and for recovery of damages and loss it suffered due to alleged violation of the Rental Service Contract ("RSC").¹³⁴ Karkey further asserted that Pakistan had violated the Pakistan–Turkey BIT obligations. The most recent development in the instant case as of 2014 is that Karkey has commenced ICSID arbitration proceedings against GOP¹³⁵ for recovery of US\$700 million. The RPPs scam does not end there, there is much yet to come out regarding this and much to discuss; Pakistan's policy makers are likely to face some bitter lessons from the instant case, perhaps at the cost of the poor people of Pakistan.

5.4.3 Reko Diq Gold and Copper Mines case

The Reko Diq gold and copper mine project case is another case which the SCP has decided in its original¹³⁶ and appellate jurisdictions¹³⁷ simultaneously. Like other projects involving FDI, the Reko Diq project has also been maligned for causing huge damage to State assets and natural resources by giving favouritism to foreign companies through corrupt practices such as corruption, bribes, kickbacks etc which have clouded the future of the Reko Diq project. Raising a protesting voice over the Reko Diq deal, the Concerned Citizens of Pakistan Society ("CCPS") accused the President, Prime Minister and Governor of the State Bank, and the Government of Baluchistan of non-transparency.¹³⁸ The CCPS alleged that US\$260 billion assets (at 2010' price) at Reko Diq were sold for nothing. The Citizens Forum called for SCP's intervention by exercising *suo moto*

jurisdiction¹³⁹ and issuance of injunctive orders against all the proceedings for grant of mining licenses to Tethyan Copper Company Pakistan (“TCCP”).¹⁴⁰ It has been alleged¹⁴¹ that the approval of a 30-year lease to TCCP without considering the expiry of Exploration License (“EL”) 5 in 2011 were suspicious. Moreover, several other doubtful activities have been pointed out, such as relaxation in the Mining Rules 1970, mysterious transfer of the entire¹⁴² share of GOB in EL6, EL8 and RL7 without any compensation, conducting 270,000 metres drilling in violation of Baluchistan Mineral Rules 2002, to hamper Baluchistan’s share misstatement about the quantity/value of discovered resources¹⁴³ disclosing less than originally discovered resources and many more.¹⁴⁴ International mining circles contended that, ‘It would be the mother of all the deals and grandfather of all the corruption cases in Pakistan, put together.’¹⁴⁵

In the course of proceedings, the SCP noted that parties concluded an addendum to the main JV which allowed the Baluchistan government to become partner of the JV in the share of its provincial department Baluchistan Development Authority (“BDA”). In addition, the addendum and Novation Agreement 2006 in the Joint Venture Agreement (“JVA”) allowed the transfer of the whole or certain part of shares. This made it possible

for the parties to complete the entire process of transferring the shares from BHP to TCCP.¹⁴⁶

In its judgment, the SCP observed that addendum No 1 dated 24 December 1999 to the JVA dated 29 July 1993 had been allowed merely to overcome the legal deficiencies in the original JVA executed between BHP and BDA. The addendum enabled the parties to make extreme changes in the original agreement such as allowing the parties to transfer their share to any amount. Incorporating the GOB as party to the JVA was another drastic change which was contrary to the Baluchistan Mining Rules 2002 and rule 7 and other rules of business of GOB. The court observed that said changes raised serious questions on the approval granted to the addendum.¹⁴⁷ Likewise, without stating any plausible reason for the relaxation in the Baluchistan Mining Rules (“BMR”) 2002 approved by the GOB, this also violates rule 98 of BMR.¹⁴⁸ The SCP further noted that apart from these deficiencies, by invoking appellate and original jurisdiction, TCC has submitted to the forum/ jurisdiction of the SCP.¹⁴⁹

Authoring its short order, the SCP held the JVA 1993¹⁵⁰ ‘illegal, void and non est’ being executed in violation and contrary to the various statutory provisions.¹⁵¹ Several agreements¹⁵² originating from the JVA have also been declared illegal and void. The

SCP through unanimous judgment held that, none of the said instruments create or grant any right mentioned in those instruments to the BHP, MINCOR, TCC, TCCP, Antofagasta or Barrick Gold.¹⁵³ It was held that EL-5 is deemed to be exploration in violation of the rules and regulations as the JVA is itself an illegal document, hence affirmed to be *non est*.¹⁵⁴

5.4.4 After-effects of Reko Diq and Rental Power Cases on FDI

The short order of the SCP in the Reko Diq case will have long-lasting effects on the inward flow of FDI in Pakistan. Like other investment projects involving FDI, as mentioned above, corruption and corrupt practices remained the main essence for rejection of this deal. The Reko Diq mining project was expected to attract the largest ever FDI in Pakistan's mining history, of approximately US\$3.3 billion.¹⁵⁵ Besides this, the most up-to-date technology and time-proven expertise of TCC and its parent companies, Barrick Gold and Antofagasta Minerals, would be introduced into Pakistan's mining field. The project was expected to create 2,500 full-time job opportunities and a further 11,500 jobs during the construction period of the project.¹⁵⁶ As stated above, the Reko Diq is situated in the poorest region and province of Pakistan. Discovery of these resources are a great blessing and unique treasure for the people of the province and Pakistan. By processing 110,000 tons of ore daily, Reko Diq mines are expected to yield 200,000 tons of copper and 250,000 ounces of gold annually for the next 60 years.¹⁵⁷

TCC stresses that, despite spending decades in field exploration and billions of dollars on several projects across the world, it discovered nothing really comparable with Reko Diq. TCC claims the gold and copper resources discovered in Reko Diq are an ‘irreparable asset’ which is most likely to produce more minerals in the future.¹⁵⁸ However, the non-serious and questionable attitude of both the parties¹⁵⁹ towards concluding commercial agreements once again has opened the space for judicial intervention. Feeling aggrieved the TCC has already filed application in ICSID and petition before ICC seeking specific performance of the contract. It seems that the Reko Diq project will remain abandoned for several years due to litigation in domestic courts and arbitration proceedings before international forums. Unwanted delay in the project will have severe financial implications on the poor Pakistani nation and the underdeveloped economy will hence further increase poverty in the country. At the same time the judgment of the SCP demonstrate that the SCP has saved billions of dollars of Pakistan’s assets from being looted by the foreign investors with the connivance of local authorities. However, in contrast, there are several serious questions about Pakistan’s treaty obligations and the undermining of international treaty and commercial arbitration. Protection of foreign investors guaranteed through BITs and other international conventions are also at stake.

As discussed earlier in the BIT chapter, being aggrieved by the judgments of the SCP in the Rental Power case, one of the rental power companies, Karkey, and following the Reko Diq judgment TCCP, have initiated ICSID proceedings against Pakistan. In both cases, those parties contended that the judgments of the SCP amount to treaty breach and violation. The claim of judicial interference in both the cases is somewhat identical with *Deutsche Bank AG v Sri Lanka*¹⁶⁰ where the ICSID tribunal held that, the central bank and the Sri Lankan Supreme Court (“SSC”) are organs of the State,¹⁶¹ therefore the action

of the Sri Lankan central bank and injunctive orders passed by the SSC in two public interest petitions were violation of the FET standard. Consequently, Sri Lanka has breached its BIT with Germany and said actions constituted expropriation. The important factor of this case in the context of Pakistan is that the orders of the SSC dated 28th November and 15 and 17 December 2008 under question were just interim restraining orders which remained in effect only for a very short period. The SSC revoked said order on 27 January 2009,¹⁶² however, despite withdrawal of said order, the action of the SSC together with the action of the central bank were held to be treaty breach, violation and expropriation. In contrast, the judgments handed down by the SCP are final judgments which as well fulfil the judicial finality rule; therefore the judgments of the SCP and the outcome in ICSID on claims arising out of these cases will set the fate of FDI in Pakistan.

Violations of treaty obligations discourage foreign investors, and thus will hamper inward flow of FDI into Pakistan. It is important to bear in mind that Pakistan is an under-developed country which lacks the financial resources and latest technology to exploit its natural resources and pass their benefits to its citizen. The aftermath of the *Reko Diq* case portrays an entirely different picture which has nothing other than costly international arbitration and delay in valuable and vital projects, to the risk and cost of Pakistan's poor nation, with much more still to come in the near future.

It is worth mentioning here that, these judgments have been largely welcomed by civil society,¹⁶³ and social, electronic and print media.¹⁶⁴ Awareness against corruption, favouritism and nepotism played a vital role to create a desire to establish a corruption-free society. This desire played a significant role in providing a level playing field to the SCP under the umbrella of Public interest litigation ("PIL"). Undoubtedly, these cases will have long-lasting impacts on limits and scope of the legislature, executive and

judiciary. Noticeably, in some cases, the judiciary did not seem reluctant to hamper the authority of other organs of the State by extending and broadening its constitutional authority. However, being the ultimate beneficiary of these judgments, civil society, the media and the legal fraternity neither concerned themselves with the constitutionality of these judgments nor took into consideration the international and economic repercussions.

The judicial activism in Pakistan nothing other than exercise of *suo moto* powers the frequent exercise of *suo moto* necessitates demarcation of constitutional limits and constitutionality of judicial activism in its current form.

5.5 Differentiating Judicial Activism and Judicial Interference

Aforementioned investigation has revealed that the judicial activism is deemed to be a positive development. It enables the judges to apply their judicial mind and wisdom to fill the gaps and lacunas in legal instruments protect CFR of the citizens and curb misuse and abuse of the powers delegated to other organs of the State. Contrarily, where judges cross their constitutional authority to encroach upon the rights of other organs of the State is considered as judicial dictatorship or judicial interference. Distinguishing judicial activism and judicial interference sets a hard task as there is a very fine and thin line between them. Therefore, it is vital to examine constitutional arrangement of powers delegated to Parliament, Executives and Judicature.

5.5.1 Historical Background and Scope of *Suo Moto* and Original Jurisdiction of the SCP

Whatever has discussed is happening in the grab of public interest litigation (“PIL”) and enforcement of constitutional CFR which requires further investigating the scope of PIL and exercise of original and *suo moto* jurisdiction upon PIL cases

The SCP is established under the constitution of Pakistan 1973¹⁶⁵ and derives its powers from the same. The constitution provides rules on appointment, retirement¹⁶⁶ and removal¹⁶⁷ of judges from their office. The constitution confers upon the SCP the role of custodian

of the constitution¹⁶⁸ and guardian of human rights.¹⁶⁹ To discharge its constitutional obligations, the SCP is endowed with original,¹⁷⁰ *suo moto*,¹⁷¹ appellate,¹⁷² advisory¹⁷³ and review¹⁷⁴ jurisdictions.

To enforce CFR¹⁷⁵ and in the matter of public interest, the SCP derives its *suo moto* jurisdiction under Art 184(3), which provides:

184(3) “without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the CFR conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.”

The SCP has the power to take judicial notice and call the authorities concerned on its own motion, where it considers that a question of public importance with reference to CFR guaranteed in the constitution is involved. The SCP is empowered to pass an

appropriate order and issue a direction to the respondent to act or refrain in the manner in which the court deems fit and proper for the enforcement of such rights.¹⁷⁶ It can call any person, document, executive or/and judicial authority for its support and issue all such directions, orders etc which it deems necessary.¹⁷⁷ The constitution obligates all the State functionaries in the country either executive or judicial to act in support of the SCP.¹⁷⁸

Exercise of *suo moto* jurisdiction dates back to *Darshan Mashi v the State*¹⁷⁹ when the CJP took notice of a telegram message about alleged forced labour and illegal detention of the petitioner and others by their employer in brick kilns. The applicant requested the CJP to get them released, considering it a PI matter and enforcement of CFR the CJP by relaxing the standard procedural rules heard the matter under Art 184(3) and granted the relief. Similarly, the SCP exercised its *suo moto* jurisdiction on a letter¹⁸⁰ regarding construction of a power station and apprehensions about likely negative effects of a power house on the health of the public at large. The SCP considered it a PI matter and enforcement of CFR and extended the relief.

Phraseology of Art 184(3) reveals that powers conferred in Art 184(3) are subject to certain requirements. The Article sets two conditions to invoke *suo moto* or original jurisdiction. It provides that the SCP can pass an order if it considers that ‘a question of public importance’ and ‘enforcement of any of the Constitutional fundamental rights conferred by Chapter I of Part II of the constitution is involved’.

The phrase ‘a question of public importance’ was first used in the currently enforced constitution of 1973. This had not been used previously in the provisions of the previous constitutions of 1956 and 1962 which conferred powers upon the SCP. It seems that the authors of the constitution of 1973 introduced said phrase intentionally for specific reasons. They obligated the judicator to exercise the authority subject to two prerequisites, namely, a question of public importance, and enforcement of CFR. These phrases have not been interpreted by the legislature either in the constitution, in any statute or in the Supreme Court Rules 1984. Interpretation of the phrase can only be found in the judgments of the superior courts that have examined the phrases from several angles and have set the binding principles for taking cognisance on PIL.

To invoke the powers of the SCP under Art 184(3) the petitioner is required to establish that the matter raised by him is one of public importance and is related to the enforcement of CFR.¹⁸¹ The construction of Art 184(3) entails to claim the violation of a right of a public nature and breach of CFR enshrined in the constitution. Phrases are construed as invading an individual’s liberty, independence or CFR, as well as efficacy and safeguarding of their execution. Consequently, the construction of the phrase “public importance” is required to be determined on a case-to-case basis.¹⁸² The phrase cannot be applied where the outcome of the case benefits to an individual or a group of individuals only¹⁸³. Nevertheless, if the outcome relates to the right and liberty of the public as a whole, the phrase can be applied. The word ‘public’ denotes a thing owned by the nation, a large fragment of society or the State.¹⁸⁴ The case for public importance cannot be made where the controversy relates to the interests of only a group of people.¹⁸⁵

Remedy under the instant article is available only to address the infringement of constitutional rights of a large segment of society and is a question of public importance. Lacking any of these prerequisites, the SCP would not exercise the original or *suo moto* jurisdiction. In the context of exercising writ jurisdiction under Art 199 of the constitution the courts are also advised not to be influenced by sensational media reports and open their decisions for criticism.¹⁸⁶ It is important to mention that writ jurisdiction is different from the *suo moto* jurisdiction as it is available to all the High Courts in the country subject to a petition filed by the aggrieved party. The current tradition where courts are taking notice on almost each and every sensational media report is completely in contrast and conflict with SCP's decision and guideline in Shahnaz Begum's case.¹⁸⁷

5.5.2 Interference in the Affairs of other Organs of the State

It is a long-standing view of the SCP that following the rules on tripartite separation of powers provided in the constitution, the legislature cannot be compelled to enact a law even if the constitution clearly commands the legislature to pass such legislation. The constitution draws a clear line between functions of the legislature, executive and judiciary.¹⁸⁸ Courts are required to interpret the constitutional provisions dealing with writ jurisdiction in the context of the whole constitution.¹⁸⁹ The presumption will go in the favour of constitutionality of the enacted law and the same should not be struck down on technical grounds. The SCP cannot take into account the validity of any law in exercise of its original jurisdiction which has already attained finality unless that is enacted in clear and direct breach of CFR.¹⁹⁰ The SCP may only consider the question of the

competence of the legislature on the enactment of a certain Act under original jurisdiction subject to the conditions that the legislature was not competent to pass said law and the same invades the CFR. The SCP would also refuse to exercise original jurisdiction to any challenge to the any constitutional provision or statute, if such law does not amount to an invasion of CFR, though otherwise is in breach of the constitutional provisions. However, the current approach of the SCP whereby it compels the legislature to enact the legislation in a certain way¹⁹¹ clearly conflicts with the settled judicial precedents hence is violation of principle of “Stare Decisis”. It is pertinent to mention here that the Stare Decisis is embodied in Art 189 & 201 of the constitution of Pakistan which binds the SCP and HCs to adhere to previous judicial precedents. Therefore, judgment passed by the SCP or HCs without distinguishing and overruling the previous judicial precedents as were seen above, may constitute a violation of the constitution. Following the constitutional mandate under the instant article, the SCP would also not exercise its original jurisdiction on mere apprehension of the breach of CFR or mere importance of the case unless breach of CFR and public importance are established.¹⁹² However, contrary to aforementioned notion, on 3rd November 2007 a seven-member bench of the SCP took notice on media reports regarding the likely imposition of a state of emergency in the country and passed an order to restrain the judges of superior courts from taking an oath on any extra-constitutional order or document. Though at a later stage this media speculation became truth, at the time the order was passed it was mere speculation and the restraining order was merely based on apprehensions. Violation of the order passed by the SCP on 3 November 2007 became the reason for removal of some 110 judges of the higher judiciary in one stroke in a subsequent proceeding of the SCP.¹⁹³

It is correct to suggest that to insure implementation of its judgments and orders, the SCP has broadened the scope of CFR¹⁹⁴ and public interest litigation in the current phase of judicial activism. By doing so, it was held that, ‘Any case which raises a matter of constitutional interpretation and enforcement regarding the composition, processes and powers of the legislatures is thus by its very nature a case of public importance, as it affects the rights of the public at large, and also affects the CFR of the citizens.’¹⁹⁵

In context of CFR and PIL, the above discussed commercial and FDI matters reveal question of public importance having direct relation with matters of public interest. However, it is not clear, if the SCP intends to depart from the constitutional requirement of violation of CFR and considers mere public importance a sufficient ground to exercise suo moto and original jurisdiction. Besides, if violation of CFR is still considered as an important factor than a clearer interpretation is required as there is nothing to suggest how alleged corrupt practices or their effects upon certain group of individuals constitute violation of CFR.

The standard legal procedure in Pakistan requires that allegations of alleged involvement of investors and State officials in corrupt practices to tailor good investment deals be probed and investigated by concerned authorities. Thereafter, such investigation report along with charge sheet should be submitted before court of first instance providing equal opportunities to prosecution to prove its case and defendants to establish their innocence. The judgment of the trial court is then assessed by the HCs and SCP in regular appeals which insures the high standard of judicial scrutiny on evidence of both sides. However, by hearing such cases in original jurisdiction and under suo moto notices the SCP has assumed the role ‘Inquisitorial’ forum. Practically, it has disregarded the scope of aforementioned standard legal procedure by limiting the role of State investigation authorities, trial court and first appellate forums.

5.6 Comparison of SCP’s power in other common law jurisdictions

It is interesting to note that, in terms of authority to issue directions, writs and orders, Art 32 of the Indian constitution,¹⁹⁶ is almost identical to Art 184 of the Constitution of Pakistan. However, contrary to the SCP the powers of the SCI are not subject to matter of public importance as was seen in the constitution of Pakistan. The Indian legislature did not use said or identical phrase in Art 32; this confers vast jurisdiction upon the SCI compared to the SCP. Though the Indian constitution does not impose a restriction comparable to the Pakistani one, the SCI has been seen adopting a very careful approach in PIL matters. Before invoking writ jurisdiction, it emphasises the consideration of any likely malice, publicity attempt or vested interest. The basic principle adopted by the court is that, when case record/evidence leads to the conclusion that under the cover of of PIL an application is ill-motivated with personal dispute or interest the same should be ‘thrown out’. Courts should not allow the hiding of the publicity, or political, private or financial interest of litigation behind PIL. Failure to regulate PIL properly and avoid its misuse means allowing ‘unscrupulous hands to release vendetta and wreck vengeance.’¹⁹⁷ Consequently, the court should remain vigilant in using the PIL tool and examine the bona fide of the petitioner.

On the question of locus standi in PIL regarding violation of constitution or statute by the governmental authority, the Malaysian Federal Court held that, despite not having any greater interest in the matter, any citizen can move a PIL petition to seek a declaratory judgment. However, to justify his petition the petitioner shall prove his interest in the subject matter.¹⁹⁸

Some serious concerns over the scope of PIL in Pakistan have already been discussed in preceding parts of this chapter. The then Federal Minister for law and justice showed grave concern in 2012 over the nature of the cases taken up by the SCP. He asserted¹⁹⁹

that a number of cases taken up by the SCP do not qualify under the scope of PIL under the constitution. Emphasising a need to draw a clear guideline for initiating PIL proceedings, he asserted that courts have to discourage the free flow of PIL. Failure to discourage that would badly affect traditional litigation and the courts will appear to be assuming administrative and executive roles rather than acting as adjudicator. He further contended that an elected government would be answerable to the public for its acts and conduct in the then upcoming elections. If a government fails to deliver according to its manifesto for which it received votes in elections, it will have to face the music. He stressed that the only way out remaining is to adhere to the theory of trichotomy of power.

The present trend of the SCP, and even in some cases HCs, to expand the scope of PIL is contrary to the aforementioned judicial precedents and clear provision of the constitution. This research could not find any judicial precedent prior to the current episode of judicial activism which justifies the expansion of PIL and CFR and brings a variety of matters including commercial and FDI matters into their ambit.

5.7 Exercise of *Suo Moto* Jurisdiction by High Courts

As discussed earlier, the Pakistani higher judiciary has been exercising *suo moto* jurisdiction on a variety of events rigorously since 2006. It seems judicial activism is nothing other than employing *suo moto* authority on PIL. As discussed above, hearing PIL in the extension of CFR has increased the interest and confidence of the people of Pakistan in the superior judiciary. Consequently, seeing a wider role in the dispensation of justice, nowadays, High Courts are also seen to be exercising *suo moto* jurisdiction on variety of cases.

Lahore High Court (“LHC”) heard a number of cases under *suo moto* authority, such as the Zarco Exchange fraud case,²⁰⁰ medical negligence case, sugar prices case²⁰¹, increase

in the fare of public transport etc. Justice Tasaddaq Hussain Jilani²⁰² while sitting as a judge in the LHC took *suo moto* notice on a news report about the death of a child from falling through an uncovered manhole. He issued a direction for registration of a criminal case against the responsible government officers of the department concerned.²⁰³ While doing so, the learned judge did not give ratio decidendi for departing from the settled judicial precedents on exercise of *suo moto* jurisdiction. The State was represented by the Khawaja Muhammad Sharif who has been proven a significant follower and supporter of the exercise of *suo moto* by HCs. As CJ of LHC, he took *suo moto* notices on several occasions already mentioned above.

The growing popularity of *suo moto* can be witnessed from its exercise in other provincial HCs, even on very petty issues. CJ of Peshawar High Court (“PHC”)²⁰⁴ took *suo moto* notice on a news report about the selling of poor and substandard meat and chapli kababs.²⁰⁵ To inquire about the failure of the government officials to observe their duty, he summoned several senior officers of the province, the Director General “(DG)” health, director of food, capital city police officer (“CCPO”) and DG livestock. The division bench of the PHC also issued a show cause notice to the chief secretary of the province. The CJ as well noticed that despite his repeated clear instructions to amend the out-of-date and ineffective Food Ordinance 1965, none of the successive governments had amended said law. In another *suo moto* on illegal car parking and bus stops, the court summoned the senior provincial officers to explain their position: the secretary of transport, commissioner and deputy commissioner, CCPO, and additionally the inspector general of traffic police.²⁰⁶

The CJ of PHC took another *suo moto* notice on a television report on disallowing women to poll/cast their vote during bye-elections in Pakistan and directed the election authorities to hold the elections again in two constituencies. He also directed the arrest of the responsible people who barred the women from polling their vote in the election.²⁰⁷ At the next hearing, the PHC being dissatisfied with the turnout at women's polling stations the court directed the Election Commission of Pakistan ("ECP") to conduct re-election at more than 54 polling stations. The PHC as well suspended the election held in two constituencies, namely NA 5 and NA 27. The court directed the ECP to forward an immediate summary to the GOP. The court suggested massive changes in the Representation of the People Act 1976 with direction to amend the Act in line with the PHC's directions. The PHC further directed that such changes should introduce strict punishment for people preventing women to cast their vote and as well ensure a certain percentage of female voters in the general and bye-elections. The PHC as well issued direction of similar nature to the GOP to move a Bill in parliament and amend the abovementioned Act to ensure female participation in the election.²⁰⁸

The instant order of the PHC has been reviewed by a three-member bench of the SCP²⁰⁹ by order dated 1 October 2013. The SCP reviewed the impugned order of the PHC and held that, the oath of the judges requires them to abide and adhere to the law and constitution, and they cannot act like a king to do whatever appeals to their minds. Following the spirit of Art 218(3) of the constitution, this matter falls within the ambit of the ECP and not the PHC. Consequently, a HC neither has the power to encroach upon the authority of the ECP nor can arrogate to itself such authority which is not delegated

to it by the constitution. Regarding extraordinary writ jurisdiction, the SCP held that it should be exercised where no alternative, adequate remedy is available in the law.²¹⁰

The ratio decidendi of setting aside the impugned order was that, subject to certain conditions, powers to suspend the election are clearly vested in the ECP by the constitution. Moreover, the law also provides satisfactory alternative remedy to the aggrieved party in such cases, and consequently the PHC lacked the jurisdiction to entertain such matters. Regardless of the observation of the SCP that judges are not free to behave like a king and are bound by their oath to follow the constitution and law, the judgment is silent about exercise of *suo moto* power by the PHC. The judgment as well did not articulate the position of the SCP on the PHC's direction given to GOP and ECP to amend the election laws.

Although in the current era of judicial activism in Pakistan everything seems possible and nothing coming out of the apex courts is surprising, a recent judgment passed by the Baluchistan High Court ("BHC") on the topic can be said to be a quite alarming one. In the instant judgment, the BHC took a clear view that the HC does have *suo moto* jurisdiction. The CJ of the BHC held that, Art 4²¹¹ of the constitution is also a CFR whereas Art 199 does not debar the HCs to take *suo moto* notice therefore the HCs and the SCP both can exercise *suo moto* simultaneously.²¹² The CJ further held that courts are no more bound to the judicial precedents delivered at the time when the judiciary was undermined. Even constitutional amendment cannot abridge a CFR and authority of the HCs to enforce such rights.

5.8 Constitutionality of *Suo Moto* by High Courts

Every authority and power should have some binding limitations and norms otherwise it will be a curse rather than a blessing. Such binding force and restrictions can play a vital

role to avoid institutional authoritarianism. Despite massive support from Pakistan's socially influential groups²¹³ *suo moto* power is not free from criticism, indeed, there are several controversies over its frequent exercise. Pakistani courts derive *suo moto* authority from the constitution of Pakistan 1973, hence this authority should be employed in accordance with the provision of the constitution.

To determine the constitutionality of the *suo moto* jurisdiction, it is significant to find its constitutional four corners without considering or being influenced by its outcomes. It is vital to investigate to whom in the legal hierarchy has been delegated *suo moto* power and under what conditions this jurisdiction can be invoked.

Part VII of the constitution provides rules for the Judicature. Chapter 1 of this part deals with the establishment and jurisdiction of the courts in Pakistan. Article 175(2) provides that, 'No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.'

Chapter 2 of this part exclusively discusses the affairs of the SCP, eg formation, appointment, oath and jurisdictions of the SCP. Article 184(3) deals with the original jurisdiction of the SCP allowing it to take *suo moto* notice on PIL and to enforce CFR.²¹⁴ Chapter 2 exclusively deals with the affairs of the SCP, hence authority conferred in Art 184(3) exclusively falls under the jurisdiction of the SCP.²¹⁵

Chapter 3 of part VII of the constitution contains rules for establishment and jurisdiction of HCs, appointment, oath, number and retirement of judges etc. Article 199 of the constitution deals with the writ jurisdiction of the High Courts, hence is relevant to the discussion. The Article provides that on application of an aggrieved person subject to the

constitution, once the HC is satisfied that the law does not provide any adequate legal remedy, it can pass any order contained in Art 199(1)a(i)(ii), b(i)(ii) & c.

The abovementioned provisions relate to: writs of habeas corpus, mandamus, prohibition, quo warranto, and writ of certiorari. Art 199(c) empowers the HCs to issue any of the aforementioned writs on the application of the aggrieved party subject to the constitution. Art 199(2) provides that to enforce any of the CFRs contained in Part II Chapter 1 of the Constitution the right to approach the HCs in this regard ‘shall not be abridged’.²¹⁶

Arrangement of the instant article demonstrates that authority to issue any of the aforementioned writs for enforcement of CFR is subject to petition by the aggrieved party. Conversely, the constitution does not restrict the powers of the SCP enshrined in Art 184(3). Reading of Arts 175(2), 184(3) and 199 together makes it obvious that the *suo moto* jurisdiction conferred in Art 184(3) rests with the SCP. Consequently, courts lower than SCP cannot exercise *suo moto* authority in any manner whatsoever.

Intention of the legislators is distinguishable from the phrasing/drafting of Art 184(3) and Art 199 where they had drawn a clear line between their powers and authorities. The powers delegated to the SCP by the legislators are not subject to the formal application/petition of the aggrieved party which is main essence of the *suo moto* jurisdiction of the SCP. In contrast, while mandating the HCs under Art 199 the legislators emphasised repeatedly²¹⁷ that it is ‘subject to the application of aggrieved party’. The formulation of Art 199(1)(c) which empowers the HCs to enforce the CFR but only on the ‘application of the aggrieved party’ further supports this contention. Had the legislators had the intention to delegate the *suo moto* authority to the HCs they should not have imposed the mandatory requirement of ‘subject to the application of the aggrieved party.’

Despite the aforementioned constitutional provisions, the HCs are seen to be exercising *suo moto* jurisdiction which appears to be a clear violation of constitutional provisions.

It gives rise to serious concerns regarding use of *suo moto* and judgments handed down by the HCs under said jurisdiction. The cognizance under *suo moto* jurisdiction by HCs remained a long-standing subject before the Pakistani higher judiciary. On the question of constitutionality of the *suo moto* authority of the HCs, several judicial precedents are available which can shed light on the controversy. These judgments were delivered before the current phase of judicial activism

It is important to mention here that Pakistan is a common law country which adheres to the strict principles of stare decisis that binds the courts to follow previous judicial precedents involving the same facts. Stare decisis is embodied in the constitution²¹⁸ which binds the subordinate courts to follow the precedents set by the SCP and HCs.

It has never been easy for the courts to avoid such precedents. The courts have to overrule,²¹⁹ reverse²²⁰ or distinguish²²¹ the previous judgment with the new one. The principle requires that the court having same status or superior to give credible logic for departing the previously settled principle. In no case subordinate court can overrule principle set by the superior courts therefore such principles have binding effect upon subordinate courts by all means.²²² Even otherwise, courts are seemed to be very reluctant²²³ to avoid settled principles where they are allowed to depart from them if deem necessary as was seen in ‘Practice Statement’ issued by Lord Chancellor, Lord

Gardiner .²²⁴ The British legal history faced the similar situation when Lord Denning while sitting in the Court of Appeal attempted to use the powers conferred to the House of Lords in said ‘Practice Statement’. While entertaining the matter of *Davis v Johnson* he attempted to ignore the judicial precedent set out in *Young v Bristol Aeroplane*²²⁵ he held that, ***“the Court of Appeal is bound by its own previous decisions is a rule of practice, not of law.”*** ²²⁶ Nevertheless, his judicial adventure was ended when House of Lords overturned Denning’s judgment in appeal holding that power granted in Practice Statement rests with the House of Lords.

Considering the longstanding common law approach it would be right to suggest that in Pakistan it is mandatory for the HCs to follow the judicial precedents of the SCP and judgment of the HCs have binding effects upon same HC and its subordinate courts. Therefore, verdicts of the apex judiciary handed down in the pre-judicial activism era are very likely a guide to the controversy and helpful to solve the constitutional puzzle.

It has been observed by the SCP that, the scope and nature of the extraordinary proceedings before the SCP under Art 184(3) and HCs under Art 199 are very different from each other. The phraseology of Art 199 has several ‘trappings and constraints’ upon proceedings before the HCs such as ‘application of the aggrieved party’ which are not applicable on the proceedings before the SCP under Art 184(3).²²⁷

The basic principle on *suo moto* jurisdiction is available in judicial precedent authored by then CJP Muhammad Munir, M. Shahabuddin J and A.R. Cornelius J in the matter of *Tariq Transport Company v The Sargodha Bhera Bus Service and others*.²²⁸ In the instant

judgment, the SCP repeatedly emphasized and held²²⁹ that HCs do not have *suo moto* jurisdiction, hence can only extend their writ jurisdiction on formal petition filed by the aggrieved party. It is important to mention here that at that time the constitution of Pakistan 1956 was enforced in the country and Art 170 conferred the powers to the HCs.²³⁰ Likewise, later on, the constitution of Pakistan 1962 had been enforced which conferred writ jurisdiction to the HC under Art 98.²³¹ In the matter of the *Islamic Republic of Pakistan v Muhammad Saeed*,²³² the three-member bench headed by CJP A.R. Cornelius held that the procedure adopted by the learned Justice was fully in conflict with the general principles to deal with such kind of petitions.²³³ HCs should restrict themselves to the prayer as it could not grant any *suo moto* relief in writ proceedings. Subsequently, the instant principle was followed by the SCP in the matter of *Akhtar Abbas v Nayyar Hussain*²³⁴ where Masters Justice Aslam Riaz and Nasim Hassan Shah held that, ‘it is settled law that in writ proceedings relief must be confined to prayer made in the writ petition and High Court cannot issue a writ *suo moto*’²³⁵ The most significant feature of the *Pakistan v Muhammad Saeed* case is that it is held, the court cannot compel the legislature to pass any Act notwithstanding the constitution clearly obligating the

legislature to pass a certain Act. The court by relying on *Ferris, law of extraordinary legal remedies*, concluded that, ‘even though the constitution expressly command it, nor be restrained from passing an Act, even though the constitution expressly prohibits it’.²³⁶ It was further observed that Pakistan adheres to the theory of trichotomy of power where all three branches of the State – the legislature, the executive and the judiciary – work within their own domain independently. For a harmonious working environment, it is vital for all three branches to understand and follow their respective limits and avoid trespassing on the other branches’ sphere. Therefore, a writ of mandamus cannot be issued to compel the government officials to perform any and every kind of duty. Perhaps government officials can be ordered to perform their duties purely ministerial in nature; however, requiring them to make rules in exercise of statutory authority can barely be considered ministerial obligation.²³⁷

It reveals from the aforementioned discussion that exercise of *suo moto* by HCs is entirely in contrast with the dictums laid down by the SCP on several occasions. Whereas, direction given by the PHC to GOP, ECP and provincial government in two²³⁸ different *suo moto* cases to enact a new law and amend an old one²³⁹ is totally in conflict with position taken by the SCP in *Pakistan v Muhammad Saeed*. The aforementioned part of the instant judgment is significant as nowadays the SCP, and in some cases the HCs, by exercising extreme judicial authority has been seen rigorously compelling the legislature to legislate as per their direction. Assuming such powers by the courts is clearly in divergence with the settled judicial precedents. It indicates that the SCP, and in some cases the HCs, are invading the domain of the legislature and executive.

Another important judgment handed down by the SCP on the topic is, *Shahnaz Begum v the Honourable Judges of the High Court of Sind and Baluchistan*.²⁴⁰ then CJP Justice Hamood ur Rahman and four other judges dealt with very important aspects of the *suo moto* jurisdiction; the judgment can be considered as one of the masterpiece judgments of the SCP. The SCP did not take this case in a routine matter, but instead dealt in a manner that judgment would end the controversy over the *suo moto* jurisdiction of all HCs and will be applicable therein. The CJP observed that the instant case involved the significant question that relates to the ‘jurisdiction of all High Courts.’ Emphasis given to the ‘important question relating to the jurisdiction of all High Courts’ clearly demonstrates the intention of the court while delivering the instant judgment. The SCP called the Advocate Generals (“AG”) of the provinces of Punjab, Sind and Baluchistan to assist in determining the *suo moto* jurisdiction of all HCs.²⁴¹ Both the learned AGs contended that the constitution does not confer *suo moto* power to HCs. Taking into account the restriction laid down in Art 130²⁴² and powers conferred in Art 98²⁴³ of the constitution enforced at the time, the instant case was heard and the SCP held that HCs have no power to take *suo moto* notice despite the fact that Art 98 delegates the judicial review powers to HCs under specified circumstances. The SCP made it clear that Art 98(2)(a,b&c) clearly obligates the HCs to exercise such power only on ‘application of an aggrieved party or of any person’, and hence held that, ‘there is no scope for any *suo*

moto action by the High Courts'.²⁴⁴ The SCP held that *suo moto* actions taken by the HCs of Sind and Baluchistan were without jurisdiction, hence were unwarranted.²⁴⁵

The most important aspect of the instant judgment is its concluding paragraph whereby the CJP observed that it is significant to note that judges of the superior judiciary should not get influenced by the magnificent reports of the newspapers or things observed outside the court. The CJP added that being influenced by the thrilling news clippings would amount to encouraging trial by the media. Similarly, by taking into account out-of-court, personal observations, the court would unnecessarily expose itself to the criticism of being biased and self-motivated.²⁴⁶

The concluding paragraph of the instant judgment is significantly relevant with the current investigation as in the recent phase of judicial activism the majority of the *suo moto* notices have been taken on media reports. Instead of following the guiding principles set by the SCP, nowadays courts are openly welcoming the role of the media²⁴⁷ by taking account of media reports in open court. It will be correct to suggest that by doing so judges are opening themselves and their judgments to the criticism of being biased and self-motivated.

In another judgment, the Sindh High Court (“SHC”) addressed this issue. In the instant case, Juvenile Jail Landhi Karachi (*suo moto* notice), the CJ wanted to employ *suo moto* authority.²⁴⁸ The judgment authored by CJs Ajmal Mian and Mukhtar Ahmad Junejo has significant importance as the judgment determined the *suo moto* jurisdiction of the HCs

under the existing constitution of Pakistan 1973. The judgment shows the prudence of the court as before authoring the instant judgment, CJ called²⁴⁹ the panel of renowned and senior lawyers²⁵⁰ for assistance in addressing the controversy. The court went beyond the *suo moto* by asking the question of disqualification of a judge to sit in the bench who takes *suo moto* notice of a certain issue. It was the unanimous view of the all the learned senior lawyers²⁵¹ to which the court also agreed unanimously that, under Art 199 of the constitution of Pakistan 1973 the High Court cannot issue *suo moto* a writ to grant any of the relief prescribed in the instant article.²⁵² On the question of disqualification of the judge to hear the matter who initiates *suo moto* proceedings, the court held that, to disqualify a judge from a hearing, it is important to prove his nexus with some personal interest or any biasness. Mere personal observance of a certain event and taking notice of it would not automatically disqualify a judge to hear such a matter.²⁵³

Another important judgment handed down by the Sindh High Court on the issue under the existing constitution is *Ardeshir Cowasjee etc v K.B.C.A. etc.*²⁵⁴ Justices Zahid Qurban Alvi and Anwar Zahir Jamail reiterated the long-standing stance of Pakistani courts that the constitution does not delegate *suo moto* power to the HCs. The court held that Art 199 requires initiating any writ proceedings in the High Court on the application of an aggrieved person. Following the expression contained in Art 199 ‘on the application of any aggrieved person’, the HC can only invoke its writ jurisdiction on an application

of an aggrieved person.²⁵⁵ The view taken by the court in this judgment was similar and endorsed the previous stance of the higher judiciary of Pakistan already discussed above.. The consistent stance of the superior judiciary on the controversy of *suo moto* power of the HCs is maintained by the very renowned judges, the majority of whom are Chief Justices of Pakistan at different periods of time.²⁵⁶

It is worth mentioning here that the author of the judgment in the *Ardeshir Cowasjee* case Mr. Justice Anwar Zaheer Jamali who ruled against *suo moto* by HCs is now elevated to the SCP and is part of the judiciary famous for judicial activism and *suo moto* authority.

The formulation of constitutional provisions and judicial precedents discussed above clearly indicated that the HCs do not have *suo moto* powers. Furthermore, discussion revealed that neither legislature has any intention to entrust *suo moto* powers to HCs nor is there any significant case available to establish that the HCs ever attempted to assume or exercise *suo moto* power prior to the era of judicial activism. Contrary to this old position, in the current era of judicial activism the HCs are seen to be exercising *suo moto* on a variety of issues. It may well be argued that cases like fixing sugar prices, transport fares or registration of criminal cases in foreign currency exchange matters indicate the likelihood of the HCs interference in FDI matters. The verdict of the BHC on exercise of *suo moto* as well demonstrates the ability of the HCs to interfere in FDI matters and commercial contracts similar to the SCP.

5.9 Outcomes and Desirability of Judicial Activism

As custodian of the constitution and CFR of the people, the SCP has broadened the scope of PIL and CFR. It has provided to the people easy and cheap access to justice against all sorts of arbitrary acts of State officials.²⁵⁷ Acting *suo moto*, the CJ relaxes all the procedural requirements to initiate legal proceedings against random, heinous crimes.

The superior judiciary has established a system of strict check and balance over the ultra vires acts of the executive²⁵⁸ and legislature.²⁵⁹ The SCP has developed a thought to abide by the constitution and statute by chasing corrupt practices and bad governance in the institutions of public importance and rulers. Failure to abide the constitution and statute, corrupt practices and bad governance are subject to judicial review and scrutiny. Judicial intervention to force the executive and legislature to obey the law of the land²⁶⁰ is helping to eradicate their discriminatory actions. Similarly, by way of interpretation of the constitution, statute and rules, the SCP is playing its role to enforce law equally on all citizens, presuming that no one is above the law²⁶¹ in the State and everyone is equal.²⁶² It also ensured the smooth functioning of the democracy and democratic institutions by ensuring the 2013 general election occurred within the time frame given by the constitution²⁶³ and as well as forcing the elected government to hold local body elections according to the constitution.²⁶⁴

The SCP has also proven its active role by saving billions of dollars by taking strict action on dozens of corruption cases, commercial deals and contract awards. It has also curbed the nepotism and favouritism in appointments, promotions and posting and transfers of important posts. No doubt, to do all this, the SCP has to encroach upon the spheres of

other organs of the State. A classic example of this is the insurgency in Karachi and Baluchistan case where executives had badly failed in bringing peace: the law and order situation was serious, and thousands of people were died in target killing and bomb blasts in just a few years. During the hearing of the law and order situation case in Karachi, it was revealed by the SCP that about 19,000 NATO containers were missing. These containers were released from Karachi port but never reached their destination. Smuggling of these thousands of containers caused billions of rupees loss to government exchequer on one hand and on other became a main cause of insurgency across the country. The majority of the missing containers were full of deadly weapons which were later distributed across the country to support and spread the militancy, but no one took notice of it except the SCP.

The aforementioned investigation reveals that the citizens of Pakistan are the direct beneficiary of the actions of the SCP, ranging from price controls to missing persons, annulment of discriminatory laws. It can be argued further that, in a State like Pakistan which is plagued by corruption and facing dilemmas of bad governance, a live and assertive judiciary is vital and essential to rescue the poor nation against the criminal apathy of the elite class. Consequently, in the specific social, economic and political scenario of Pakistan, judicial activism is considered as a last resort for the poor and underprivileged class of citizens against the capricious acts of the elite and privileged class in Pakistan.²⁶⁵ Lord Denning once said, ‘All power tends to corrupt. Total power corrupts absolutely. Who is to control the exercise of power? Only the judges. Someone must be trusted, let it be judges.’²⁶⁶

Practical implementation of Lord Denning’s saying can be seen in Pakistan where the people have great confidence and trust in the judges of the superior judiciary. It is taken as a blessing and divine revolution by the majority of the Pakistani people and they strongly support this development.²⁶⁷ Consequently, notwithstanding the other outcomes

and consequences, there is no question about the desirability of judicial activism in Pakistan; it is a most desired and required trend in Pakistan. The people of Pakistan have nothing to do with the constitutionality, limit and scope of the authority of the superior judiciary however, it does not necessarily mean that judicial activism has no drawbacks or that the SCP is free to act as it desires.

The constitution of Pakistan follows the theory of separation of powers and adheres to the trichotomy of power principle by describing the role of all organs of the State separately. The constitution delegates the power to legislate to parliament and running the government and taking policy decisions rests with the executive/government. The judiciary has authority conferred upon it to interpret the law and constitution, among other powers already discussed above. The *suo moto* authority in its current form seems in direct conflict with the trichotomy theory and purports to disturb the balance of power set by the constitution. Mandating the SCP to act as per its desire rather the constitution would itself be a violation of the constitution.

Pakistan follows the adversarial judicial system; however, under *suo moto* authority and original jurisdiction, the SCP has also assumed inquisitorial powers.²⁶⁸ Involvement in supervising the investigation and taking direct cognisance of politically motivated cases has opened the judgments and actions of the SCP for criticism at national and international levels. The AHRC²⁶⁹ called this authority ‘contentious’ and against the right to fair trial which the Constitution guarantees.²⁷⁰ Therefore, judicial intervention in such matters amounts to hampering the right to fair trial and access to justice in due process of law and creates serious concerns about the rule of law in the country. Escalation in political tensions between the judiciary and politicians will damage the Pakistani people

beyond any gain. The commission asserted that the Pakistani judiciary has crossed all the limits of its authority.

An example of criticism of said judicial authority was seen when then chairman of the NAB asserted that the SCP has no authority to monitor the progress of investigation. He as well maligned the SCP for involving itself in political motives to harm the governing party in the upcoming election. Similarly, Justice Katju a former judge of the Supreme Court of India reacting on disqualification of the Prime Minister of Pakistan, said that²⁷¹ the SCP has fully gone beyond its jurisdiction and ‘flouted all the cannons of constitutional jurisprudence’, and did not follow judicial restraint. The approach adopted by the SCP will disturb the idea of separation of powers provided in the constitution. He added that, the Prime Minister can perform his duties until he has the confidence of the parliamentarians and ‘not the confidence of the Supreme Court’. Here, it is important to consider the view of Justice Sardar Raza Khan, a former judge of the SCP who was one of the judges in the SCP during the current era of judicial activism. In his article,²⁷² Justice Raza outspokenly stated that the judges of the SCP were violating the code of conduct by passing judgmental remarks during course of proceedings and currently, the judiciary cannot be said to be an independent judiciary. Justice Raza showed his concerns regarding corrupt, talking, biased, prejudiced judges and those who invade upon the rights of the legislature under the guise of interpretation.

Judicial activism in its current form seems also fatal for the traditional justice system which allows the parties to file appeal, judicial review and/or revision if not satisfied with the judgment of the originating court. Right of appeal is a universally accepted right which insures justice between the disputing parties. After filtering the facts of the case and evidence on several judicial forums, it is very unlikely to deprive any person from his legal rights unjustly. In contrast, where a case or inquiry is initiated from the highest judicial forum of the country, the spirit of due process of law and right to fair trial becomes badly injured. In such cases, the chances of injustice cannot be overruled as

executive, investigator and subordinate courts undergo undue influence and pressure from the highest judicial forum. This seems contrary to the mostly emphasised maxim that, ‘Justice should not only be done, but should manifestly and undoubtedly be seen to be done.’²⁷³

Suo moto jurisdiction seems a lottery which can be won by anyone at any time; no one knows, out of dozens of thousands of applications whose application will be taken up by the SCP. There are no clear parameters and criteria to measure the scope of political motivation, ethnic bias, personal enmity or business gain behind applications urging the SCP to take *suo moto* notice of a certain event. This further creates doubt about existing laws and policies; who knows when and which law or policy will be declared null and void by the SCP under *suo moto* or original jurisdiction. Especially in the matters of FDI, an investor would remain uncertain about the future of a specific law, treaty, policy or commercial agreement. In a given situation, a foreign investor would be reluctant to invest his capital being unsure about the future of his investment and protection granted to him by the law of the land. Last but not least, there is a huge pendency of appeal and review cases before the SCP. This backlog may increase day-by-day because of applications entertained directly before the SCP. It is unquestionably discouraging to those litigants who preferred to follow the track of the traditional judicial system and reached the final forum in search of justice after long, strenuous efforts and spending significant monies. If *suo moto* is meant to be dispensing justice then what of this delay, for *justice delayed is justice denied*.

5.10 Conclusion

The USA is deemed to be the pioneer of judicial activism for all countries governed under a written constitution. Pakistan is a common law country having a written constitution, hence several important judicial precedents from the US jurisdiction have been critically analysed in earlier parts of the chapter. The cases analysed range from the *Marbury* case (1803) where Chief Justice Marshall laid the stone of judicial activism to the *National Federation* case (2012) where the court categorically emphasised that it has the power to invalidate an Act of Congress. It reveals that over 210 years of judicial activism that the

US Supreme Court has never hesitated to overrule a statute or Act of Congress contrary to the constitution. However, it is also as rescuer of the State where the government was reluctant to take necessary measures on specific issues, policy making or legislating due to fear of political reaction of the dominant fraction of society. The court also attempted to save the statute rather than destroying it where it appeared as possible, though partially so.

In the era of judicial activism, the SCP, by expanding the scope of PIL, has been found to be exercising its original and *suo moto* authority very rigorously. It proved to be a torch bearer of the rule of law by applying the law of land to the President and Prime Minister of the country, as equal of a common citizen. The RPPs and implementation of NRO judgment indicate that no one is above the law without prejudice of the power and authority, neither Prime Minister nor President of the country nor powerful foreign investors; everyone is answerable for his deeds.

By redefining the constitutional obligations, the SCP requires the executive to; accomplish their duties with the greatest capacity, honesty and faithfully in accordance with the constitution, law and rules of assembly, to uphold the 'sovereignty, integrity, solidarity, well-being and prosperity of Pakistan' and preserve it against any likely threat. By means of these obligations, the SCP cautions and spreads the message among the responsible to be vigilant and careful before tailoring favourable deals through unfair means. The SCP is very likely to call shady deals for judicial scrutiny and may apply its judicial wisdom to ascertain the facts. Application of judicial wisdom will further broaden the scope of overseeing the statutory and constitutional provisions to do justice. Besides all this, it is evident from the subsequent proceedings of the cases that the SCP can play a role of inquisitorial tribunal and can go to any extent for the implementation of its orders. It can monitor the investigation, entrust the case to the investigation officer of its own choice, cancel the posting transfer, pass an order of arrest and on failure to comply with its orders, can proceed for contempt of court. It did not allow members of the executive to interfere and hamper the investigation by means of posting transfer of the investigation officers and new appointments. By taking notice of several financial scams, commercial deals, frauds, mismanagement, illegality, irregularity, nepotism etc, the SCP has saved billions of dollars from being looted.

Despite whatever has been said above, this investigation also revealed that, to stop the other organs of the State from abuse of their power and authority, the SCP sometimes seems to be encroaching upon their spheres. Encroaching upon the sphere of other organs of the State and interfering in their matters amounts to judicial interference, which is somewhat different from the desired judicial activism. It is to be remembered that there is a very thin line between judicial activism and judicial interference, which latter may result in negative outcomes and institutional power games. The aggressive exercise of the judicial authority especially in commercial matters where FDI was involved has also proven to be negative as is observed in the aftermath of PSM privatisation, Reko Diq and the RPP case. Apart from financial loss, exercise of *suo moto* in commercial cases has left the GOP open to costly treaty and commercial arbitration and damaged its reputation regarding its treaty and international obligations. Nevertheless, the element of corruption, bribes and misuse of power were present in those cases, which could not be ignored, hence requiring transparency in the governmental system.

The investigation also revealed that the constitution does not confer *suo moto* powers upon the High Courts. Exercise of *suo moto* by the HCs is in clear violation of the constitution and settled principles of laws and judicial precedents and entirely different from the SCP's power, hence are clearly judicial interference rather than judicial activism. Most specifically, the judgment of the BHC on the ability to exercise *suo moto* by the HCs is found to be very alarming for Pakistan's constitutional jurisprudence. The SCP seems idle on the exercise of *suo moto* by the HCs and did not call into question their ability to take *suo moto*. Moreover, violation of the principle of stare decisis by ignoring the previous judicial precedents causes further uncertainty and unpredictability on the applicability, existence and future of prevailing laws.

An assertive judiciary has proved its effectiveness for dispensation of justice and political stability in the country and has strengthened the faith of the people in the judicial system. Equally, the people of Pakistan have also proven themselves as a great supporter of the judicial activism in Pakistan. A significant majority of the lawyer community, civil society and media backs the judiciary. Their support reinforced the constitutional authority of the SCP when they fought for the freedom and restoration of the higher judiciary against the Head of State, the president wearing an army uniform, and for democratic government, equally. This spreads the message

amongst the masses that notwithstanding their political attachments, the majority of Pakistani citizens favour judicial activism and stand behind the SCP hence there is no question regarding the desirability of judicial activism in Pakistan, and it is most desired phenomenon in the country. Citizens of Pakistan being the ultimate beneficiary do not bother about the constitutionality or any repercussion of judicial activism. However, to balance the role and authority of the SCP, there must be some check on the scope and limits of judicial powers. If not, then it is very likely that the SCP may take over the roles of executive and legislature in the name of interpretation and enforcement of CFR and PIL.

CHAPTER 6: LEGAL PROTECTION GRANTED IN PAKISTANI LAW

6.1 Introduction

The previous chapter has investigated the judicial activism in Pakistan and compared it with some other common law jurisdictions. Significance of municipal laws of the host State regarding their effects on FDI has been observed in chapter 4 on BITs. Therefore, purpose of writing this chapter is to shed light on Pakistani laws with reference to FDI hence this chapter investigates standard of the legal protection afforded to the foreign investors under municipal laws of Pakistan. To discover the level of legal protection afforded to FDI in Pakistan at the domestic level, this chapter will examine the legal instruments enacted by successive Pakistani governments in different decades. Moreover, besides investment policies, determination and intention of the host State to attract FDI are reflected in its domestic legal regime and instruments. A State enthusiastic to attract FDI would offer speedy and steady legal remedies under an effective legal system.

The basic source of law in the country is the constitution of Pakistan 1973 which guarantees protection of constitutional fundamental rights (“CFR”) of Pakistani citizens. The Foreign Private Investment (Promotion & Protection) Act 1976 (“FPIA”) directly relates to fundamental principles on FDI and deals with issues relating to foreign capital and industrial undertakings. Similarly the GOP enacted the Protection of Economic Reforms Act 1992 (“PERA”) to protect economic reforms announced or implemented by the GOP after 7th November 1990. This chapter will examine aforementioned constitutional provisions and statutes along with the Foreign Exchange (Temporary Restrictions) Act 1998 (“FETRA”) which was promulgated under unavoidable and unfavourable circumstances after nuclear tests in Pakistan. The Act had imposed certain restrictions on foreign currency account holders (“FCAs”) by lifting protection given under PERA. Besides this, newly enacted acts related to international arbitration, the Arbitration (International Investment Dispute) Act 2011 (“AIIDA”) and Recognition and Enforcement (Arbitral Agreement and Foreign Arbitral Awards) Act 2012 (“REAF”), will also be examined in this chapter. Investigation regarding domestic legal instruments will be helpful to discover the level of protection afforded to foreign investors under municipal laws of Pakistan. Spotting the weaknesses will help further to suggest improvement in domestic legal instruments and spread the positive message to foreign investors about protection of foreign investment in Pakistan.

6.2 Constitutional Protection under the Constitution of Pakistan 1973

Chapter 1 of the Constitution deals with CFR and freedom of trade, business or profession. Article 18 provides that, ‘Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.’¹

The article narrated above recognizes, ‘freedom of trade, business or profession’ as a CFR. The constitution grants freedom to choose any business, profession or trade subject to certain conditions, if there any, such as obtaining requisite licences, permits etc. A State is responsible to ensure the rule of law by also protecting other rights of its citizens, such as health and safety, and protection of their religious and cultural beliefs. Obligation to observe such conditions pursuant to the domestic laws and best policy of the State may as well be deemed as an additional guarantee for protection of business and trade. Consequently, any constraint imposed illegally on anyone will be considered in violation of Arts 18 and 23 of the constitution, hence liable to be declared void.² However, the courts have the consistent view³ that a person who lawfully adopted a profession, business or trade under Art 18 cannot be deprived of his right despite the fact that said right is not absolute under the constitution. Though by means of regulation a State can restrict this freedom, however such restriction must be in accordance with reasonableness. To define the scope of ‘regulation’ used in Art 18, the SCP has considered constitutional provisions of the Indian constitution⁴ and several judgments⁵ and has set the test of reasonableness leading to definition of unreasonableness of

restrictions. A restriction on freedom to choose a business or profession is deemed to be unreasonable if it is arbitrary, excessive and beyond the scope of public interest, procedure to enforce such restriction is in violation of the constitution, absence of provision to review such decision etc. Prohibiting a particular business or profession in a manner to deprive a person from his constitutional fundamental rights qualifies as unreasonableness.⁶ Considering the aforementioned test the SCP laid down the basic principle of having jurisdiction to declare an Act of parliament unconstitutional if it is enacted in violation of fundamental rights. The court held that, “if any law is promulgated in derogation of fundamental rights, it would be declared void because at the cost of fundamental rights, guaranteed by the Constitution, the executive Government is not empowered to frame a policy.”

To elucidate the constitutional protection further it will be significant to consider Art 18 together with Art 24 of the constitution which guarantees to protect property rights. Article 24 stipulates that, ‘No person shall be compulsorily deprived of his property save in accordance with law’.

The phraseology of ‘No person shall’ signifies that not only a Pakistani citizen but any person living, working or doing business enjoys constitutional protection enshrined in Art 24. Use of ‘in accordance with law’, however, denotes the authority of the State to enact or implement laws for acquisition and deprive a person from his property. It is important to mention here that said right to acquire or expropriate is not absolute, therefore it is required to be in consonance with the conditions, parameters and in a manner set out in Art 24(2&3 a-f); and

(2) “No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.”

It is settled principle that if a property is acquired for public purpose and interest such action must be followed by ‘adequate, fair, just and due compensation’⁷. To determine the fairness of compensation or award the court being guardian of the fundamental rights emphasises to keep all aspects in its mind such as whether acquired property was the sole source of income of the aggrieved person.⁸ Any action taken in violation the constitutional stipulations mentioned above will be held void even if such order was for a specific limited time and temporary in nature.⁹ The court stressed that construction of the phrase ‘without authority of law’ necessitates fixing the compensation amount, denoting the principles and manner to determine the compensation. On reading of Art 24(2), it transpires that no property can be compulsorily acquired unless required for public purpose, by the authority of law and followed by compensation. Though Art 24(3) contains some exceptions for such takings, however it has been made clear in the provision that a law has to be enacted for this purpose. Therefore, ‘that in a case, without a specific law, no person can be deprived of his property or its possession taken by the Government.’¹⁰

In a similar line, but with a different force, it has been held in another case that, where the underlying action of the executive deprives a person from his property, such action should have authority of law to support which must be proved. Failure to comply with such law under which acquisition has been made will result in nullity of such action. It has been held that, ‘... the result which flowing there-from would render such action nullity in the eye of law, coram non judice and the same would be reduced to naught.’¹¹

It has been emphasized further that it is obligatory for the courts to invalidate any act conducted by government functionaries conflicting with the law and rules regarding their authority. Power to ascertain such rights are deemed sacred trust, hence ‘...to be exercised justly, fairly, judiciously and in accordance with law. Any violation of such principles would render their impugned orders nugatory.’

The SCP is the guarantor for the rights falling under the chapter of CFR and government functionaries can neither infringe nor deviate from constitutional prerequisites discussed above. Any attempt or act contrary to law¹² to invade or encroach upon such constitutional guarantees is subject to judicial review and the court will react sternly to any act which infringes the CFR maliciously and malafidely. It is held by the PHC that, “...Courts shall not hesitate to firmly establish and issue writ to the wrong doer requiring him/them to do what is required by law to do and to refrain from doing an act which is prohibited by law and the Constitution.”¹³

Narration of Art 24 with assertive use of ‘no property shall be compulsorily acquired or taken possession of’ demonstrates the weighty constitutional guarantee and strong will of the legislature to protect the property rights of every person living or working in Pakistan. The higher judiciary of Pakistan have affirmed their firm support to protect the property rights from acquisition or taking possession by the State without due process of law and proper compensation.

The guarantees and rights enshrined in the constitution cannot be disregarded or thrown away by the executive or privileged class as the constitution stays at the top of the legal regime pyramid. Moreover, it cannot be amended in simple or standard ways; the constitutional assembly has embodied a very tough and complex procedure to amend the constitution. The constitution can only be amended by at least a two-thirds majority of both the houses of the parliament; the National Assembly and the Senate.¹⁴ In the specific

political context and environment of Pakistan, achieving a two-thirds majority in both houses of the Parliament has never been an easy task.¹⁵ Parliamentary history has rarely witnessed¹⁶ any government who achieved such a double majority. In addition to the aforesaid firm procedure to amend the constitution, the guarantees provided in Arts 18 and 24 are the subject of the CFR chapter which falls under the salient features of the constitution.¹⁷ The current development in terms of judicial precedents discussed in chapter 4 ‘judicial activism’ in Pakistan also indicates that any amendment conflicting with CFR,¹⁸ basic structure of the constitution¹⁹ or discriminating to any person, group or class²⁰ is subject to judicial review and the courts reserve authority to undo such acts. Therefore, the protections offered under Arts 18 and 24 of the constitution equally apply to foreign investors and their assets in Pakistan. It is very unlikely for State functionaries to encroach upon these protections or deprive foreign investors of their constitutional rights in any manner whatsoever. However, to improve these constitutional guarantees in relation to foreign investors and FDI some recommendations will be made in next chapter.

6.3 The Foreign Private Investment (Promotion & Protection) Act 1976

It has already been discussed in the earlier chapters that GOP’s policies remained inconsistent and varying in different decades. Despite constitutional assurances, the

decision to nationalize private industries and businesses of Pakistani citizens blew an alarming whistle for foreign investors. Their anxiety and apprehensions compelled the GOP to adopt some measures to restore their confidence.

The basic rules on foreign investment were laid down in the Foreign Private Investment (Promotion & Protection) Act of 1976 (“FPIA”) which deals with issues related to ‘industrial undertakings’ established by foreign investors in Pakistan on or after September 1954. FPIA has been promulgated to promote and protect foreign investment and to regulate other supplementary matters related to FDI in Pakistan. The Act has defined the terms foreign capital and foreign private investment. Foreign capital includes any investment made by a foreign national in an industrial enterprise which includes foreign exchange, imported machinery and equipment or any other type of capital approved by the GOP. For the purpose of the Act, foreign private investment means ‘an industry, undertaking or establishment engaged in the production, distribution or processing of any goods, the providing of services specified in this behalf by the Federal Government or the development and extraction of such mineral resources and products as may be specified in this behalf by the Federal Government.’²¹

The phrase ‘industrial undertakings’ used in FPIA is defined in section 2(c) as ‘entities involved in the production, distribution or processing of “goods”.’ Section 5(2) of the Act provides that, ‘...Foreign capital or foreign private investment in an industrial undertaking shall not be acquired except under the due process of law which provides for adequate compensation...’

At the same time, this section, 5(1), also affirms the sanctity of the investment *agreements* concluded by the investors. It provides that, where in the public interest the government takes over the management of an industrial enterprise having foreign investment or acquires the shares of Pakistani nationals in such an enterprise, none of the agreement related to such undertakings approved by the GOP will be affected. This included agreements ‘entered into between a foreign investor or creditor and any person in Pakistan.’

From a legal perspective, the FPIA grants merely a restricted protection and assurance to foreign investors because broad discretion has been vested in the executive. Section 3 of the Act provides that, ‘The Federal Government may, consistent with the national interest, for the promotion of foreign private investment, authorize such investment in any industrial undertaking...’.²²

Ingredients of the aforementioned section reveal that GOP has preserved the right to extend or restrict the scope of FDI by allowing or disallowing it in any industrial undertaking. For example, FPIA grants protection to FDI in an industrial undertaking in the shape of ‘foreign exchange’ or ‘imported machinery’ or ‘equipment’ or in any other form to be agreed by the GOP meaning that the government has retained the authority to either expand or limit the applicability of the instant Act by issuing notification. In the case of ‘industrial undertakings’ related to provision of services, the protection has been guaranteed just to those industrial undertakings whose services are ‘specified in this behalf by the Federal Government.’

Section 4 provides that, ‘Where the Federal Government sanctions an industrial undertaking having foreign private investment, it may do so subject to such conditions as it may specify in this behalf’.

The abovementioned provision has further extended the discretionary powers of the government, stating that where GOP sanctions an industrial undertaking having FDI ‘it may do so subject to such conditions as it may specify in this behalf.’ Subject to the provisions of the Foreign Exchange Regulation Act 1947, foreign investors in such industrial undertakings are granted the right to repatriate foreign private investment to the extent of the original investment, profit earned on such investment and any other amount earned by investing such profit in repatriation services. Section 7 deals with transfer of funds by foreign employees employed in Pakistan for the ‘maintenance of their dependents’ abroad in ‘accordance with the rules, regulations or orders issued by the’ GOP or the State Bank of Pakistan. Furthermore, section 8, which deals with taxation matters, provides that foreign investment in such undertakings will not be subject to additional taxes on their income save those applicable on the domestic investors in similar

conditions. Furthermore, in pursuant to instant section, foreign investors are entitled to the benefits of all the agreements signed by Pakistan with the country of origin of investment for avoiding double taxation.

FPIA also contains provision for the equal treatment of foreign investors. Section 9 is drafted in line with national treatment clauses. It provides that, for the purpose of application of laws, rules and regulations on import and exports, undertakings having foreign investment shall have equal treatment as is given to similar industrial undertakings having no foreign investment. It will be correct to suggest that, despite some reservations on weaknesses and tricky provisions discussed above, FPIA was a positive move towards restoration of confidence of foreign investors during the era of nationalization in Pakistan. FPIA was the first statute directly related to foreign investors, and established rules for FDI and endorsed the rule of “Equal Treatment”. The equal treatment clause requires for identical handling of foreign and local investors in the application of laws, rules and regulations concerning to import and export of goods. Significantly, subject to some extensive restrictions, the Act authorizes the GOP to allow FDI in new or previously banned sectors. Allowing FDI in previously banned sectors discussed in chapter 3 increased the opportunities for foreign investors to broaden their investment participation in Pakistan. This in turn has left some positive impact on inward flow of FDI stimulation of FDI in the pre FPIA era as already discussed in chapter 3. Protection of Economic Reforms Act 1992 Aiming to continue and protect economic reforms and establish a liberal atmosphere for savings and investment, GOP enacted the Protection of Economic Reforms Act 1992 (“PERA”). The Act has been promulgated to give legal shelter to economic reforms concerning privatization and deregulation and other monetary incentives initiated by the government through various programs, policies and regulations on and after 7th November 1990.

Sections 4,5,6,7,9 and 10 deal with freedom to bring, hold, sell and take out Foreign Exchange (“FE”), immunities for foreign currency accounts (“FCA”), protection of fiscal incentives for setting up of industries, secrecy of banking transactions and protection of financial obligations.²³

All citizens of Pakistan resident in Pakistan or outside Pakistan and all other persons have been declared entitled and free to bring, hold, sell, transfer and take out FE within or out of Pakistan in any form. They were neither required to make FE declaration at any stage nor shall anyone be questioned by the GOP in this regard. The Act guarantees the continuation of said immunity to disclose source of income by income tax department or any other taxation authority. According to the Act, FCAs have been exempted from wealth and income tax and it is obligatory for the banks to maintain full secrecy of transactions on these accounts

The FCA holders in Pakistan are guaranteed that no limitations will be enforced on their deposits by the SBP. The law assures the investors that the economic incentives granted to them through rules and regulations shall persist for the term agreed therein and shall not be modified to their disadvantage. The Act further provides guarantee for maintaining the secrecy of FE transactions.

However, the most significant issue has been dealt with by section 8, which provides that for protection of foreign and Pakistani investment:

“No foreign, industrial or commercial enterprise established or owned in any form by a foreign or Pakistani investor for private gain in accordance with law, and no investment in share or equity of any company, firm, or enterprise, and no commercial bank or financial institution established, owned or acquired by any foreign or Pakistani investor, shall be compulsorily acquired or taken over by the Government.”

It has been observed in discussion on FPIA that the government had reserved rights to acquire industrial undertakings under cover of ‘Due Process of Law’ making it possible to acquire FDI in such undertakings. In this context, section 8 of PERA can be considered as an admirable development to address said issue.

Nevertheless, once again the inconsistency in the policies has been seen dominating over all the efforts and reforms of GOP. Following the nuclear test on 28 May 1998, the government had to introduce the Foreign Exchange (Temporary Restrictions) Act 1998 (“FETRA”). By means of FETRA, the government imposed certain temporary restrictions concerning FE and overrode various provisions of PERA. The government restricted FCA holders from withdrawing, transferring or taking out of the country FE

without permission of the SBP. It, nevertheless, permitted the FCA holders to exchange their foreign currency into Pakistani currency at the officially notified exchange rate.

Pursuant to FETRA, the SBP instructed the FCA holders to convert their FE into Pakistani currency. FETRA had been declared illegal by the SCP²⁴; the court held that, the FCA holders were entitled to receive interest and/or profits in foreign currency at rates settled in their original agreements with the banks. Non-resident Pakistanis and foreigners may exploit the interest in any manner including the right to remit it abroad. The GOP and the SBP shall evolve a scheme for the gradual removal of restrictions on operation of FCA imposed by the FETRA and by all means a reasonable provision in this regard shall be made.²⁵

Afterwards another attempt to restore the shaky confidence of foreign investors was ben made by the GOP. In 2001, the President of Pakistan issued the Foreign Currency Accounts (Protection) Ordinance 2001 (“FCAO 2001”) affirming further guarantees and assurances to foreign investors. Section 3 of the ordinance provided that:

“no person shall be deprived of his right to hold or operate such account or in any manner be restricted temporarily or permanently to lawfully sell, withdraw, remit, transfer, use as security or take out foreign currency there from within or outside Pakistan.”

This section precluded any likelihood of expropriation or freezing FCA even on a temporary basis, giving account holders’ an inalienable right to manage and get all sorts of benefits from their FCAs.

The rationale behind section 4 seems to protect the State and its functionaries from being called and questioned in the courts regarding their acts and deeds under the instant ordinance. This ordinance remained enforced for several years with re-pronouncement by the President. However, after just five years after promulgation of this ordinance,

Pakistan experienced an unprecedented wave of judicial activism. In this era, the SCP has expanded its authority to revisit and if deemed necessary undo all sorts of acts including statutes. FCAO 2001 was one of those 37 presidential ordinances which have been hit in the SCP's verdict in the NRO case. These ordinances could not get parliamentary assent within the time prescribed by the SCP in the NRO judgment, hence it was abolished.

FCAO was one of the significant steps towards restoration of confidence of foreign investors amongst others and Pakistan successfully managed to attract huge FDI in the first half of the 2000s.²⁶ In 2005, the World Bank report acknowledged Pakistan in number one position in the region and in the top ten globally within top reformers to facilitate investors and their investment, making it easier to start a business, reducing the cost to register property, increasing penalties for violating corporate governance rules, and replacing a requirement to license every shipment with two-year duration licenses for traders.²⁷

6.5 Enactment of New Arbitration and Enforcement Laws

Besides executing a large number of BITs, Pakistan is also one of the original signatories²⁸ of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention 1958" ("NYC") and the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 ("ICSID Convention"), also known as the Washington Convention.²⁹ However, Pakistan took forty years to ratify these conventions in its municipal laws and endorsed both the conventions respectively through separate presidential ordinances promulgated

in 2005 and 2007. It is worth mentioning here that as result of an interesting litigation during the peak era of judicial activism in Pakistan the SCP declared both the ordinances void unless passed by the parliament as statutes within a stipulated period.³⁰ Both the Conventions have now been recognised through separate Acts of the parliament: the Arbitration (International Investment Dispute) Act 2011³¹ (“AIIDA”) and the Recognition and Enforcement (Arbitral Agreement and Foreign Arbitral Awards) Act 2011³² (“REAFA”). The former recognizes the ICSID Convention and the later validates NYC in Pakistan’s municipal laws.

6.6 Arbitration (International Investment Dispute) Act 2011

AIIDA provides rules on recognition and enforcement of ICSID awards and it comprises of two parts. The first part deals with the substantive issues in sections 1-10 whereas the second part/schedule has incorporated the ICSID Convention in the Act. Section 1 of the Act is a standard short title, extent, application and commencement provision] whereas section 2 defines the important phrases and expressions used in the Act. Jurisdiction for recognition and enforcement of award rendered in auspices of the ICSID has been given to the HC. Award is required to be registered in the HC on furnishing the proof of award and subject to other provisions of the Act.³³ For the purpose of execution, the award registered in Pakistan will have the same effect which the judgment of the HC has.³⁴ Section 5 provides that sections 3 and 4 shall have binding effect upon the government, however provision makes it clear that Act does not make an award binding if a judgment would not be binding on the government. Furthermore, the instant provision provides

that, sections 3 and 4 will not have binding effect upon the government if it was not party in the award.³⁵ It has been made clear in section 7 that DAA 1940 would not be applicable upon the ICSID arbitral proceedings. The Act denotes that provisions of Art18, 1920, 21(a) and 22 of the Convention as it applies to Articles 21(a), 23(1) and 24 shall have force of law.³⁶ The Act empowers³⁷ the Federal Government to make rules regarding procedure to apply for the registration of an award, requiring the applicant to issue notice to the respondent before applying for registration of the award. Similarly, the GOP may make rules to prescribe matters to be proved on application and manner of proof, to require the applicant to provide service of notice to all respondents.[³⁸ REF?] Furthermore, subject to provisions of ICSID, the GOP is empowered to make rules to grant the stay against execution either ‘provisionally or otherwise’ or on any other matter which it may deem necessary to accomplish its responsibility under the Act.³⁹ The AIIDA 2011 has incorporated the ICSID Convention as a schedule.

The AIIDA is a positive development in Pakistan as it has ratified the ICSID Convention in Pakistani municipal laws which has been pending for several decades since becoming a signatory of the Convention. Ratification of the ICSID convention in Pakistani municipal laws will communicate a positive message to foreign investors that Pakistan is willing to fulfil its international obligations regarding protection of FDI. Therefore, they can invest in Pakistan with full confidence and trust that their investment will not be subject to discriminatory acts, and if so, they have all the guarantees and protections in place by means of BIT and ICSID convention. Despite acknowledging the AIIDA as a

positive development in arbitral jurisprudence in Pakistan, it is appropriate to examine the AIIDA with two angles: likely controversies arising out of the AIIDA and significant issues it failed to address. The application of sections 3 and 4 has binding effect upon the GOP, however the court may refuse to enforce the award on the ground that the domestic judgment may be not be enforced against GOP such as contrary to its public policy, invalidity of arbitration agreement being result of fraud, commission, bribery etc⁴⁰ or grounds set in section 30 DAA. Though the AIIDA has completely outlawed the application of the DAA on enforcement proceeding of ICSID awards, nevertheless grounds for refusal contained in the DAA are still grounds under which Pakistani courts may refuse enforcement. The condition laid down in the instant provision indicates that despite the significant move of harmonising the municipal arbitral regime with the international system, the AIIDA has preserved rights of the domestic court to refuse an ICSID award against the government.

The AIIDA has incorporated the ICSID Convention as a schedule, Art 54 of which prohibits the municipal courts from reviewing the matter and obligates them to recognise and enforce ICSID award as final and conclusive judgment of domestic court. However, pursuant to Art 54(3) enforcement of the award is subject to the domestic enforcement laws of the executing State. According to Art 55 enforcement pursuant to Art 54 shall not be interpreted in a manner to derogate from the law of the executing State regarding immunity of the State.

Reading section 5 AIIDA with Arts 54(3) & 55 makes it obvious that while dealing with enforcement of ICSID award the HC has vast jurisdiction to refuse the enforcement against the State and its assets especially sovereign assets, eg assets of the State Bank of Pakistan (“SBP”), assets having defence strategic importance.[Delegating original jurisdiction to the HC will reduce the cost and time of litigation as it has reduced at least two judicial forums, the civil court and the district court. The scope of appeal against a decision in favour or against enforcement of an ICSID award is not clear from bare reading of the AIIDA. Nevertheless, considering the original jurisdiction of the HC, powers of the SCP and judicial activism it would be correct to suggest that on limited

grounds such as domestic public policy, enforcement of CFR, invalidity of arbitration agreement being result of fraud, commission, bribery the forum of the SCP is open in either case.

The significant development of the AIIDA is that it has clearly outlawed the DAA upon proceedings related to ICSID arbitration and award. Prohibition on the DAA may enable the award enforcing courts/High Courts to accomplish the enforcement proceedings and work smoothly by avoiding unnecessary technicalities and formalities. It may be argued that no law can be deemed to be a bad law completely and the same applies to the DAA as besides some disadvantages, the DAA also has some advantages. Application of such advantageous provisions may well be helpful in enforcement proceedings. Therefore, debarring the DAA will also create some shortcomings, discussed below, which should have been addressed in the AIIDA, but regrettably it failed to observe such deficiency.

Discussion has revealed that the AIIDA does not provide rules to debar the domestic courts from exercising parallel jurisdiction on matters falling under auspices of ICSID as has been witnessed previously in *SGS v Pakistan*. It reveals that the AIIDA has not embedded rules to stay the proceedings before the municipal courts falling otherwise under the ICSID jurisdiction. Moreover, it neither provides rules on judicial assistance in aid of ICSID arbitration for the collection or preservation of evidence nor does it prescribe rules on seizing or attaching the underlying assets or subject matter of the proceedings. The AIIDA does not provide replacement of or alternative to the provision of the Arbitration Act 1940 referred as Domestic Arbitration Act (“DAA”) enabling the domestic courts to grant interim relief by means of interim injunction, preservation, inspection, custody or taking hold of underlying

Lacunas and shortcomings discussed above affirm the earlier contention that wholly debarring the DAA without offering its replacement will create some shortcomings and increase controversies and ambiguities. Furthermore, it has also been revealed that despite elapse of more than three years GOP has neither promulgated any rules in compliance with its obligations enshrined in section 9 nor taken any serious step to make such rules. It is worth mentioning here that such rules relate to several important aspects, stages and issues of arbitration and enforcement of award. These include rules applicable procedure on registration of award, notice of intent to commence registration proceedings, matters and manner of proof, requiring the applicant to provide service

notice to all respondents, provisional or otherwise stay against execution, any other matter which the government deem fit and proper to the subject. Non-availability of rules on these aforementioned vital aspects and non-compliance with section 9 by the GOP will leave a depressing impact on the entire development of the legal regime and spread a negative message about protection of FDI in Pakistan

The GOP's failure to make applicable rules for the AIIDA (which in fact relates to its international obligations and commitments) is likely to overshadow the positive move of harmonizing the domestic legal regime with international commitments. It will also diminish the positive message that Pakistan intends to spread about protection of FDI in Pakistan.

6.7 Recognition and Enforcement (Arbitral Agreement and Foreign Arbitral Awards) Act 2011

The REAFA deals with the issues of international arbitral agreement and recognition and enforcement of awards falling under NYC. The new Act is applicable to the arbitral agreements concluded before, on and after the commencement of the Act; however, awards announced prior to 14 July 2005 are not covered by the instant Act.⁴¹ This date is when Pakistan first ratified the NYC in its municipal law by promulgating the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance 2005 ("REAO").⁴² The REAFA comprises of two parts, the first deals with substantive issues in sections 1-10, whereas the Schedule part has made NYC an integral part of the Act. Section 1 is a standard short title, extent, application and commencement clause, whereas section 2 provides definitions of the important expressions and phrases used in the Act. The REAFA explicates that on the matters arising under the Act the competent court will have exclusive jurisdiction and will enjoy all those powers which the civil court does have under the CPC 1908. The applicable procedural law will be the CPC 1908.⁴³ If there is any suit pending before the court regarding the subject matter of

arbitration either party having arbitration agreement may apply to the court for stay of proceedings. The trial court is obligated to stay the proceedings and refer the matter for arbitration unless it finds that the underlying arbitration agreement is null, void, inoperative or incapable of being performed.⁴⁴ It requires the Pakistani courts to recognise and enforce foreign arbitral awards in similar manner as it recognises and enforces the judgment announced in Pakistan. However, the court may refuse to do so if award is contradictory to section 7 of the Act which has contemplated grounds for refusal contained in Art V of the NYC.⁴⁵ Another significant development can be seen in section 8 which provides that in the event of any contradiction between the instant Act and NYC the latter will prevail to the extent of such contradiction.

The REAFA repealed the Arbitration (Protocol and Convention) Act 1937 (“APC”), however, the 1937 Act shall remain in effect to the extent of the foreign arbitral awards announced before the enforcement of REAFA. Besides, it will remain applicable on those awards which are not deemed as foreign awards pursuant to section 2 of this Act.⁴⁶

The examination of the REAFA has exposed several deficiencies and problems in the instant Act. The definition of foreign arbitral award contained in section 2(e) does not provide a clear sense that under this definition what could be treated as a foreign arbitral award. Unclear provision is very likely to create confusion and ambiguity on construction of the phrase. Section 2(e) provides that, foreign arbitral award means an award ‘made in contracting State and such other State as may be notified by’ the GOP.

Whether an award is a foreign arbitral award or not within meaning of the REAFA? The answer to the question is enveloped in multi-tier problems. The HC may determine the status of the award in a variety of ways by applying the test of law governing the arbitration theory and seat of arbitration theory. Whether the award is deemed as a foreign

award if the law governing the arbitration was the law of Pakistan but the award has been rendered out of Pakistan? Pursuant to section 9(b) of the APC 1937,⁴⁷ if arbitration is held out of Pakistan but the governing law was Pakistani law, the *theory of applicable law on arbitration* proceedings will prevail and determine the fate of the award. In such situation the award will be deemed as a domestic award. In *Hitachi v Rupali*⁴⁸ the SCP held that, where the governing law of the arbitration was Pakistani law, notwithstanding the seat of arbitration the award will be considered as a domestic award and not a foreign award. Following the same dictum, in its recent judgment the HC has held that, if arbitral proceedings falling under NYC were governed under Pakistani law, the award rendered as result of such proceedings will be deemed as a domestic award, hence the DAA will be applicable on enforcement proceedings.⁴⁹ It has been emphasized that the REAFA has not expressly outlawed the DAA, therefore court may refuse the enforcement of such award relying on any of the grounds embedded in the DAA. Application of the DAA demonstrates the immense authority of the domestic courts on such proceedings, which is further strengthened by the force of CPC 1908. Similarly it is also not clear from bare reading of section 2(e) what would be the status of the award if rendered in Pakistan but governed under the law of a State other than Pakistan.

Despite the abovementioned shortcoming, Nida⁵⁰ considers the REAFA as a positive development in Pakistani arbitration law and stresses that section 2(e) is clear enough to apply the *seat of arbitration theory*. Conversely, the aforementioned judgment of the HC portrays a different picture, however Mansoor⁵¹ hopes that the SCP will end the controversy and overturn the verdict of the HC.

Section 4 of REAFA may also be seen as a positive development in the arbitration regime in Pakistan. It requires the domestic court to stay the proceedings in favour of arbitration and refer the disputant parties to seek arbitration pursuant to the arbitration agreement. The grounds to refuse a stay are very limited and precise, which include if the arbitration agreement is null and void, inoperative or incapable of being performed. Under the previous regime, the courts have vast authority and before deciding to enforce or refuse the international arbitration clauses as standard practice used to examine several aspects, such as the likely place of arbitration, place of disputed transaction, access and availability of evidence, balance of convenience and inconvenience, cost of international arbitration etc. However, enactment of the REAFA has significantly curtailed the powers of the courts regarding enforceability of arbitration agreement and requires compulsorily staying the proceedings and referring the parties to arbitral forum.

Section 6 entails that a foreign arbitral award will be recognized and enforced in Pakistan, deeming it to have the same force as the judgment rendered by the Pakistani court. Pursuant to section 2(d), the HCs of four provinces and the Federal HC or any court specifically notified by the GOP have exclusive jurisdiction upon the matter arising out of the REAFA. Status of the foreign award equivalent to the judgment of a HC of Pakistan reflects that the executing party will not be required to spend additional time and money to make the award rule of court at the pre-enforcement stage as has been discussed under the DAA. It is worth mentioning here that the REAFA has not completely outlawed the DAA and also requires that in exercise of its jurisdiction the court shall follow the procedure as nearly as may be provided in CPC 1908. Besides, the court will enjoy all the powers vested in civil court under CPC.⁵² The DAA and significance of the CPC have already been discussed in an earlier part of this chapter. Investigation on both the statutes has revealed several technicalities and hurdles therefore application of both the statutes on the REAFA may cause delay in enforcement proceedings of award. It may not be out of the question that while exercising powers of the civil court, the executing court may frame the issues and require the relevant parties to furnish their oral and documentary evidence which would further generate several controversies. It has also been revealed

that there are no rules available to specify the procedure to deal with issues arising out of the REAFA. The federal government may make rules pursuant to section 9, however despite more than three years having elapsed, the GOP has not notified such rules to ensure the smooth working of the arbitral regime in Pakistan in line with its international obligations.

6.8 Conclusion

The discussion carried out in this chapter has ascertained the importance of domestic laws to attract and promote FDI. The investigation into the domestic laws of Pakistan reveals GOP's willingness to improve its domestic regime regarding FDI and harmonize it with contemporary global developments in international investment law. Articles 18 and 24 of the Constitution of Pakistan insure protection of CFR, fair and equal treatment and prohibition to acquire or expropriate the properties of people living or working within Pakistan. Protection enshrined in the constitution, strict procedure to amend the constitution and its equal application on foreign investors and their assets demonstrate the strong constitutional protection afforded to foreign investor. The SCP is custodian of CFR hence provide support for protection of right defined under CFR and no one can be deprived from the rights guaranteed in the constitution. Expropriation without due process and compensation and fair and equal treatment have been seen as being the backbone clauses of almost every BIT. Therefore, it would be correct to suggest that these BIT provisions are guaranteed by the constitution of Pakistan which cannot be avoided in the normal course without amending the constitution. The constitution has set a very strict amendment procedure and in the era of judicial activism seems to be subject to the judicial review of the SCP. Nevertheless, some further improvements in constitutional provisions will enhance the existing protection and will also make some uncertain issues clearer.

Likewise Tthe FPIA 1976 was the first statute directly related to foreign investors and it provides the complete code of foreign investment. Enactment of the FPIA was an encouraging step to restore the confidence of foreign investors during the era of nationalization of private assets. The act gives freedom to investor for the selection of business and profession. It provided a statutory guarantee for equal treatment and empowered GOP to allow FDI in new sectors. The examination has also revealed some tricky provisions and weaknesses in the FPIA such as section 4; however, despite the

elapsing of almost four decades GOP has not made even a single step to improve the statute. The PERA 1992 was also a significant step to guarantee consistency in the policies and for protection of FDI in Pakistan. Section 8 of PERA was an admirable move to grant protection against expropriation and address the tricky provision contained in the FPIA. However, pronouncement of the FETRA and restriction imposed under it diminished the positive signs of the FPIA and once again exposed the chronic problem of inconsistency in government policies. Considering the latest development regarding FDI laws in Pakistan, some vital amendments are required in both statutes to enable them to correspond with the contemporary issues of FDI in Pakistan.

The enactment of two new statutes, AIIDA and REAFA, can be seen as an encouraging step taken by Pakistan. Notwithstanding the several deficiencies and shortcomings already discussed above, both the Acts have made the recognition and enforcement of foreign arbitral agreement and award rendered under the auspices of NYC and ICSID Convention comparatively far easier than ever before, though not completely easy. on one hand, whereas on the other it has preserved the ACP to the extent of foreign awards not falling under the meaning of section 2(e) of FETRA. This restrictive saving of ACP made it possible to enforce a foreign arbitral award which was not covered within the meaning of section 2(e). As a result, it has reserved the dual possibility of enforcement of a foreign arbitral award in Pakistan under either one or other Act; REAFA or APC.

The deficiencies and shortcomings in both statutes mentioned above could possibly have been addressed by the operation of section 9 of both Acts. Section 9 of both the Acts have authorised the GOP to make the rules regarding several aspects and stages of recognition and enforcement. However, it has also been observed that GOP has not cared to make rules which were imperative for successful operation of both the statutes, reckless attitude in not making rules and observing its statutory obligations. GOP's failure to comply with its statutory obligations, which are directly related to the international obligations and commitments of Pakistan, is likely to overshadow the positive enthusiasm to harmonize the domestic legal regime with international conventions. This necessitates GOP to make rules in compliance with the provisions of both Acts and also to address the shortcomings, deficiencies, lacunas and weaknesses of the REAFA and AIIDA discussed above. Prompt response of GOP in this regard is also necessary because both statutes have been promulgated recently in 2011, therefore law has not yet been developed in the shape of

judicial precedents. It might take several years to develop judicial precedents on controversies arising out of both statutes because, understandably, much debate will occur before matters reach to the SCP.

Therefore, absence of rules will give rise to controversies, instead of giving comfort and confidence to foreign investors and GOP, equally.

CHAPTER 7: RECOMMENDATIONS TO ADDRESS THE DETTERING FACTORS

7.1 Introduction

In previous chapter, detailed discussion on the importance of domestic laws of Pakistan for ensuring strong protection of the FDI in Pakistan was done. As discussed in preceding chapters of this study that Pakistan adopted new reforms for protection and attraction of FDI, but still to date, Pakistan has been witnessing massive decline in FDI since 2008 and has been experiencing an unprecedented wave of judicial activism since 2006. The GOP's failure to comply with its obligations, which are directly related to the international obligations and commitments of Pakistan, is likely to overshadow the positive enthusiasm to harmonize the domestic legal regime with international conventions. The variation and decline in FDI demonstrate the existence of problems and issues regarding protection of FDI in Pakistan. It has been seen that some of the statutes, eg Foreign Private Investment Act 1976, are significantly outdated. They neither meet contemporary requirements nor address the current issues arising out of development of the investment and treaty regime. Besides, these laws have never been amended, nor is there any judicial precedent available to answer the current problems concerning FDI. This requires identifying the existing problems having potential to negatively influence the foreign investor's decision to invest in Pakistan.

Based on the investigation carried in this study which has identified a number of and flaws this chapter makes recommendations, suggestions and required amendments in constitutional and statutory framework to make them fit in the contemporary requirements of today's era. It further suggests a mechanism to negotiate BITs as well as a template and suggestion to improve BIT draft. Hence, this chapter has been written as a valuable effort in presenting the possible ways to address the deterring factors and contribute in existing literature.

Note on notation: To clearly distinguish between recommendation text of the author's design and use of single quote marks for quotations from sources and other uses, the text of this author's recommendation uses double quote marks.

7.2 Recommendations on BITs and Investment Contracts

Investigation conducted in chapter 4 has found some positive relationship between FDI and BITs for countries offering perfect market and location with a less risky environment. This demonstrates Pakistan's potential to attract and ability to absorb FDI as perfect

market and location as found in chapter 2. Pakistan can exploit the aforementioned factors by offering a better and improved treaty regime along with a strong domestic regulatory framework. A variety of threats and negative approaches discussed in the study require the GOP to provide ironclad and trustworthy assurances and guarantees to foreign investors in unambiguous terms.

7.2.1 Setting up a Credible Specialized System for Negotiating BITs:

Besides inconsistency in the policies, the study conducted in chapter 4 has revealed the chronic problem of signing BITs without proper mechanisms in an inconsistent and haphazard manner. Investigation of selected BITs endorses the contentions raised by the former AG and found that GOP could not improve its several decades' old approach despite facing a number of treaty claims.

Considering the aforementioned statement and the study conducted in chapters 3 and 4, the GOP is required to take the following measures to eliminate the shadows of corruption and political motives behind executing investment contracts.

A specialised department be established which shall consist of highly qualified experts and professionals in economic international relations and commercial and investment treaty arbitration regimes. It is significant to mention here that the cost of establishing and running such a department will be considerably low compared to the cost for a single treaty or commercial arbitration.

1. The GOP is required to avoid aimlessly executing new BITs or renewing old BITs in a mechanical manner. It should evaluate the impacts of old BITs in terms of stimulating inward flow of FDI, repatriation of foreign exchange affecting the balance of payment and monetary cost of the treaty, damage to reputation and inconvenience caused. The GOP shall also assess its future needs, potential sectors having the ability to absorb FDI and desired sectors for which it requires FDI. Further to the assessment, GOP may task to its economic experts to identify countries having potential investors, skills and technologies related to the desired sectors. Experts shall also be assigned responsibility to prepare an economic feasibility report with the implications of having FDI in such sectors. Considering the likely positive or negative economic effects measured in the feasibility report, the GOP may decide to take initiatives to

negotiate and execute or avoid signing a BIT with such State. This will help the GOP to attract FDI in desired sectors and avoid negative impacts of FDI, as discussed in chapter 3. The same procedure shall also be followed before executing an independent investment contract with foreign investors.

2. The GOP must notify the name of the department¹ responsible to conduct negotiation and execution of BITs with due advice and consent in writing from the stakeholders² notified by the GOP. To address the problem of uncertainty and inconsistency in the future, the draft of the BIT shall be presented before the Federal Cabinet and the Economic Coordination Committee (“ECC”) for approval. Further to approval from said committees, the draft may also be presented before both houses of the parliament for parliamentary assent.
3. To eliminate the shadows of allegations of bribe, malpractice, commission, kickback and favouritism etc, the GOP shall also follow a similar process with minor changes for awarding mega projects and executing investment contracts with foreign investors. Depending on the nature of the contract and place of execution such changes may include the stakeholders, the provincial government concerned and relevant federal ministries.³ The category of stakeholders may vary project to project; hence, to avoid any nuisance in the future, the GOP would need to adopt a vigilant approach to involve all stakeholders in accordance with the project and contract.
4. To avoid any likely inconvenience in the future and eliminate the tricky political games,⁴ it is further recommended that, near to end of its term, the

sitting government should refrain from executing any mega project deal. If it desires to do so, it shall constitute a special committee of the National Assembly and obtain a written approval in the form of a parliamentary resolution from said committee, which shall be comprised of the opposition leader, the parliamentary leaders of all the opposition parties in the parliament, the Chief Minister, the opposition leader of the province or provinces where a project would be executed and members of the ECC who represent the government.

7.3 Significant Features for Model or Future BITs

Certainly, BITs are an important primary source to grant some additional rights for investors and impose additional obligations upon the host State, which also define significant requirements to commence proceedings. Therefore, while concluding such BITs, it seems justified and logical to expect contracting States to adopt a prudent approach, and have comprehensive discussion and negotiation on provisions of the BITs. Considering the debate on Pakistan's selected BITs in chapter 4, the following clauses and phrases will require special consideration by Pakistani negotiators. Incorporating the following provisions besides the standard provisions or in explanation notes will reduce the probability of liberal or extended interpretation by arbitrators.

7.3.1 Definition of Investment

Considering the debate on various definitions of the investment contained in the selected Pakistani BITs, it is here recommended to add the following clarifications on certain issues together with qualification of investment. Future BITs shall add into the definition of investment that:

1. "To qualify for BIT protection as investment, an investment shall have monetary value and have contributed to the host economy in a manner to promote some positive economic development for a lasting period of time, the investor will have borne some cost and shared some operational risks to achieve financial benefits."

The fact that an investment relates to any of the categories mentioned in the instant BIT would not automatically bring it into the definition of investment unless it meet all the

qualifications mentioned in paragraph 7.3.1 (a), consequently to determine the investment the parties agree to adopt the *Salini v Morocco*⁵ test.

Given that almost every BIT includes intellectual property rights within the definition of ‘investment’, therefore it is recommended that, “such intellectual property right shall be governed under the law of the host State and in accordance with its public policy”. Alternatively, emphasis can be given to “the investment shall be construed in accordance with the laws and policies of the host State at the time of investment” or “according to the documents of admission of an investment”.

The term ‘investment’ and any sort of dispute/s regarding the meaning or interpretation of any provision, expression or phrase used in the instant treaty or any other treaty considered for the purpose of extending or deriving ‘most favoured nation clause’ shall be interpreted with the ordinary meaning in pursuant to Art 31 of the Vienna Convention on treaties.⁶

7.3.2 Umbrella clauses and dispute resolution mechanism

Interpretation of umbrella clauses has led arbitral tribunals to distinct decisions, as discussed.⁷ Inconsistent verdicts handed down by the tribunals created unpredictability about the future outcomes of umbrella clauses. This requires the signatory States to adopt a vigilant approach while drafting umbrella clauses and determine their scope in the first instance. Therefore, it is recommended that whatever the phrase used in the future BIT, the following clarifications must be incorporated:

Predetermine the scope of the treaty and contractual obligations and their breach. It should be distinguished which particular contractual or other obligation falls within the scope of an umbrella clause, noncompliance to which would amount to treaty breach.

2. Similarly, when the choice of law for dispute resolution in the BIT is different from the choice of law for settling the dispute in the commercial contract, the plausible approach would be to clarify which choice of law will supersede the other Parties may agree in following manner: “If any dispute regarding investment of the investor of one signatory State arises with or in the territory of the other signatory State, the procedure, mechanism and applicable law for dispute settlement prescribed in the investment agreement shall have binding effect and prevail over other dispute settlement mechanisms, procedures and laws contained in this or any other treaty or agreement, therefore, such dispute shall be settled pursuant to the provisions of the commercial contract.”
3. To make it further realistic and balanced for the host State and investor equally an additional clause may also be added in following manner:

“Before executing the investment contract, the host signatory State shall in the first instance inform the investor of the signatory State in writing about its right to prefer or exclusively choose the treaty forum and law. Once both parties have agreed on any dispute resolution mechanism, procedure and applicable law the same shall prevail and be enforced and in no manner whatsoever any party shall deviate from such selected forum, procedure and law.”
4. Both the signatory States shall in the first instance confirm their intention and also agree on, if they wish to incorporate a negative list for excluding certain disputes from the jurisdiction of treaty arbitral forums and giving the exclusive jurisdiction to the courts of the host State or any other forum. Such list may include matters relating to: tax, environment, child labour, labour law, minimum wages, defence and national security, public policy etc. The list is non-exhaustive and the parties may add or drop one or more categories with mutual consent. The clause may be written in the following terms that, “nothing contained in this treaty shall be construed as preventing the host State from implementing, enforcing and upholding any measure in non-discriminatory manner, which it deems appropriate to ensure that investment made in its territory by the investor of the other signatory State is in conformity with its national policy and rules on tax, environment, child labour, labour law, minimum wages, defence and national security, public policy...” etc.

5. The measures adopted by the host signatory State pursuant to clause 7.3.2 (d) in non-discriminatory manner shall not be deemed to constitute creeping or indirect expropriation.
6. Almost every BIT emphasises amicable settlement of dispute during a cooling-off period before escalating the dispute to the treaty forum. However, these provisions are silent about what steps shall be taken during such cooling-off period. It is recommended that for further clarity the parties shall also agree and provide in express terms what steps shall be taken during the cooling-off period before submitting the dispute for arbitration or dispute resolution such as submission of dispute to court of competent jurisdiction of host State, amicable settlement through negotiation on different forums e.g. diplomatic channels or referring the dispute to a special committee constituted for this sole purpose, mechanism of constitution of such committee and use of diplomatic channel may also be defined here.
7. Choice of domestic forum as exclusive forum provided in Art 10 of Pak-Turk BIT for disputes relating to real estate seems an admirable attempt which is likely to benefit the State and investors equally. Nevertheless, Pakistan is required to improve its civil and property laws, which are very complicated and time-consuming. At least, it shall introduce some special provisions to cover disputes related to foreign investors.

7.3.3 Fair and Equitable Treatment and Most Favoured Nation

The study has revealed several controversies over application of FET and MFN⁸ which gave rise to clearly divergent approaches of arbitral tribunals regarding said phrases. It is therefore recommended that the scope of FET and MFN shall be clarified in the following manner:

1. “Signatory parties have mutually agreed on the scope of application of the MFN clause and solemnly affirm that, nothing contained in this treaty or any other treaty or agreement to which one of the signatory parties is member shall

be construed in a manner to extend the scope of the MFN clause to dispute settlement provisions.”

2. “To avoid any doubt over application of MFN clause both the parties affirm in explicit terms to exclude the scope and application of *Maffezini v Spain*⁹ and *Siemens v Argentina*¹⁰ therefore application of MFN clause shall be restrictive to the extent of substantive issues and in no manner whatsoever can be stretched to dispute resolution provisions.”
3. “The following categories shall fall out of the scope of FET and MFN”¹¹ therefore, in no manner whatsoever, FET and MFN standards and benefits shall be extended or applied on these categories final list could be drafted by with mutual consent of both the parties. However it will be plausible to mention such categories such as tax or double tax treatment, benefits extended to signatory States being member regional economic integration organisations, exclude previous or future treaties specifically related to preferred sectors or sectors having reciprocal benefits, eg aviation and maritime sectors.
4. Being a capital-importing State, Pakistan shall also assert and attempt to incorporate in future BITs that, “the tribunal shall interpret the phrases FET and MFN under ordinary meaning in accordance with Art 31 of the Vienna Convention on treaties and in accordance with the laws of the host State.”

7.3.4 Scope of Legitimate Expectation of the Investor

Legitimate expectations of the investor have also been seen as one of the significant issues in treaty tribunals requiring host State to keep the legal and business environment consistent and also at the maximum level of perfect utilization of economic resources. In

a number of cases,¹² the tribunals have accepted the right of sovereign States to legislate as per its desires. Since, under current developments in treaty jurisprudence, a host State can change its regulatory regime at any time therefore, it will be irrational to expect that a prevailing situation, regulatory or policy regime will remain consistent and unchanged for the entire life of the project. Consequently, it will be prudent to adopt a balanced approach regarding legitimate expectations of foreign investors and the right of the sovereign State to legislate; hence, it is recommended to incorporate provisions in the BITs in following manner:

1. “If there any change in the existing policy or regulatory regime of the host State after enforcement of this treaty and underlying investment contract, in a manner inconsistent with the investor’s treaty or contractual rights affecting him negatively, both parties¹³ shall in the first instance resolve the dispute by means of negotiations amicably within six months from the date of receipt of notice from the aggrieved party. During said cooling-off period, the host State shall adopt all reasonable measures to resolve the dispute and cover monetary losses suffered by the investor of the other signatory State due to such act. Parties shall also negotiate to bring requisite changes and adjustments in the investment contract to make it consistent with the new legislation or policy and maintain fiscal benefits save that such fiscal benefits shall not be reduced because of change in regime.
2. “Any act of the host State, its entities or governmental departments having negative monetary implications repugnant to provisions of this treaty/or investment contract shall be deemed, nonexistent, non est, void and ineffective upon the rights of the investor of the other signatory State.”
3. If signatory States cannot guarantee to keep their legal and business environment consistent and in accordance with the legitimate expectations of the investor then the parties shall alternatively, “agree and commit to bring necessary changes in the investment contract to mitigate the negative monetary effects on foreign investor and restore his position that he had on the day of promulgation of such act or policy.”

4. The host State shall also, “pledge and consent to provide prompt and adequate compensation for the monetary losses suffered by the foreign investors due to such governmental act.”
5. Clause 7.3.4 (d) “in turn acknowledges the right of the host State to bring necessary changes in its existing domestic statutory and policy framework and to promulgate new statutes or policies to meet its internal needs, requirements, preferring, enforcing and adopting such measures necessary for cultural, religious, environmental, public and national security, defence strategy, protection and safety of health and life of people living in the host State. However, such action shall not affect the investor adversely, if so, the host State shall compensate the investor immediately in accordance with clause 7.3.4 (c-d) to restore the status that he had at the time of adoption of such act. Parties expressly adopt the approach of *Saluka v Czech Republic*, *Parkerings-Compagniet v Lithuania* and *EDF v Romania*.”
6. “On failure to resolve the dispute within the stipulated period, the aggrieved party shall have the right to recourse to the contractual dispute resolution forum for award of compensation. Nevertheless, the compensation shall neither be punitive nor shall the merits or legality of said act of the host State be called into question before any forum or court. For further clarity, it is reiterated that, nothing contained in this treaty shall prevent the parties from obtaining maximum benefits arising from a more favourable statutory or policy change mentioned above. Subject to the provision of such action of the host State, said benefits shall not be restricted to fiscal benefits and they shall include all the benefits under the new or amended law and policy.”

7.3.5 Direct, indirect and judicial expropriation

The selected Pakistani BITs demonstrate that almost every BIT has contained and explained the term ‘direct, indirect and creeping expropriation’. However, a broad controversy over definition of ‘indirect or creeping expropriation’ has been revealed in the study. Consequently, it is vital to make the scope of these phrases clearer by further elaborating the expropriation clauses or incorporating some explanation notes in the following manner:

1. “Indirect expropriation would be determined on case-to-case basis. Any governmental action or series of actions affecting the investment or its profitability alone would not be considered an expropriation. Non-

discriminatory legal measures adopted for the protection of public welfare such as health, safety and environment would not amount to indirect expropriation.”

2. “Judicial expropriation shall be deemed a separate and valid cause of action to recourse to the treaty forum.”
3. “Notwithstanding the principles of judicial finality and exhausting local remedy, the judicial decisions handed down in the host State constituting international wrong in violation of international law and confiscating the assets or investment of investor of the signatory State shall be deemed as valid cause of action to recourse directly to the treaty forum. Signatory States expressly adopt *Saipem v Bangladesh*¹⁴ save that said cause of action and adoption of *Saipem* shall not invalidate the relevance of *Loewen v USA*¹⁵ where cause of action is merely denial of justice.”

7.3.6 Denial of Justice and Exhausting Local Remedy

Judicial activism in Pakistan has been seen as a traditional approach affecting FDI, which has led Pakistan into treaty claims before ICSID tribunals. Therefore, it is important to address the problem of judicial activism in new BITs. Considering the several verdicts on the topic, it is recommended that:

1. “Right to recourse to the treaty forum on the ground of denial of justice amounting to treaty breach shall be subject to the principle of judicial finality and the host State shall not be held responsible for the judicial act unless it attains the judicial finality and creates the international wrong. Nothing contained in this treaty would amount to exclude the scope of *Loewen v United States* regarding exhaustion of local remedy and judicial finality rules before recourse to treaty forum where claimant asserts on denial of justice.”¹⁶

2. The parties shall clarify their intention in express terms to include or exclude the exhaustion of local remedies rule which shall have binding effect subject to treaty provisions. For further clarity, both signatory States may as well decide in clear terms to include or exclude the relevance of dictums laid down in *Generation Ukraine v Ukraine* and *Waste Management v Mexico*; relevancy of exhaustion local remedy in matters of indirect expropriation and to ascertain that in the matter of contractual breach whether the act under question constitutes treaty breach or not. However, where cause of action is said to be denial of justice amounting to breach of the treaty, it shall be subject to provisions 7.3.6 (a) .
3. Notwithstanding the express provision to exhaust local remedies, the aggrieved party shall not be obliged to exhaust local remedy before escalating the dispute to the treaty forum, if cause of action is said to be indirect or creeping expropriation subject to the provisions of this treaty, save if not repugnant to any other clause contained in the instant treaty. For further clarity on to recourse to the treaty forum directly, the allegation of indirect expropriation shall not fall under the scope contained in sub sections of 7.3.2.

7.6 Recommendations on Judicial Activism

Investigation carried out in chapter 5 has revealed judicial activism in Pakistan as a traditional and expanding approach which has direct implications on FDI in Pakistan. Exercise of *suo moto* jurisdiction by the SCP in expansion of PIL and the ability of HCs to exercise *suo moto* jurisdiction has been found to be the main problem. Several negative implications of exercise of *suo moto* jurisdiction in commercial matters have been observed which include significant financial loss¹⁷, opening Pakistan to costly treaty and commercial arbitration for alleged violation of international treaties,¹⁸ and also damaging the reputation of Pakistan with regard to its international obligations. To distinguish the

desired form of judicial activism from unwanted judicial interference and address the latter, the investigation has considered several options such as ‘to sack or remove activist judges’ or ‘curtailing the powers of the SCP and HCs’. Whilst considering the both the options mentioned above it revealed that two successive governments have already tried both the options time and again however could not succeed. For detailed legal reasoning and discussion in the light of constitutional provisions and case laws encompassing several decades please see the appendix 5 attached herewith. Therefore, in the current context of judicial activism in Pakistan both the options are impossible to implement hence following recommendations are made to address the judicial activism in Pakistan.

7.6.3 ‘Someone must be trusted, let it be judges’¹⁹

Once it had been said, perhaps rightly, that, ‘We are under the constitution, but the constitution is what the judges say it is’.²⁰ Inability of the executives to sack or remove the judges and the inability of parliament to amend the constitution to curtail the powers of the SCP portrays the constitutional deadlock on judicial activism, where everyone finds himself at a dead end. However, someone has to decide, someone has to be trusted, all ways lead to the SCP; so, let it be judges to decide.

The third possible solution to address the judicial activism is filing a reference before the SCP and let the judges find the answer. The Constitution of Pakistan bestows upon the SCP advisory jurisdiction²¹ and the President of Pakistan can send a reference under Art 186 to SCP requiring it to answer the questions of public importance raised by the President. Justice Iftikhar Chaudhary has been considered as the torch bearer of judicial activism in Pakistan but has now reached retirement, as have many other judges²² who

played active and assertive roles. Investigation carried out in chapter 5 on judicial activism also found some judges who handed down their verdicts against exercise of *suo moto* by the High Court; said judges now have been elevated in the SCP. Therefore, the formation of the current SCP seems more balanced to receive the presidential reference. Even otherwise, the verdict of the SCP on the presidential reference will either end the controversy over judicial activism or at least will end the uncertainty by defining the final and real position of the SCP on constitutional deadlock. This will clear the picture to foreign investors about the capability of State entities to conclude commercial agreements and ultimately will be helpful in their investment decision-making. The format and the question of reference would definitely play a significant role. The following format and structure of the questionnaire may be considered as a template or guideline for a likely draft of reference to be sent by the President to the SCP.

1. What constitutes 'public importance' with reference to the enforcement of fundamental right conferred in chapter 1 of part II of the constitution? The Scope of fundamental rights in this chapter and the scope of public interest litigation may also be redefined.
2. Redefine the scope of *suo moto* under Art 184(3) of the constitution with limitation on exercise of such powers. The SCP also shall determine the ability of the HCs to exercise *suo moto* in the light of judgments handed down by the SCP and HCs on the subject. The SCP may further be required to decide the applicability of said previous judgments by, upholding, overruling, overturning or distinguishing the same.
3. Whether commercial matters under the international and bilateral treaties and Conventions fall within the scope of *public interest* with reference to the enforcement of fundamental right conferred in the chapter 1 of part II of the constitution? If yes, the SCP shall define the parameters for executing the bilateral and commercial treaties and agreements.
4. Whether investment contracts/agreement with foreign investors covered under BITs or other International or Regional Investment Treaties or Conventions could be treated as public interest matter with reference to the enforcement of fundamental right conferred in the chapter 1 of part II of the constitution and called into the question in the SCP under *suo moto* or original jurisdiction? If yes, the SCP shall define the parameters, limits and standards for executing investment contracts and the bilateral, International, Regional Investment Treaties.

5. The SCP be asked to give verdict on the scope of Art 339 most specifically Art 339(5 & 6) regarding amendment in the constitution. Is there any limitation on parliament's right to amend the constitution? If yes, the SCP may further be required to decide the applicability of previous judgments on the topic by overruling or distinguishing the same. Moreover the SCP may also define the powers of the all organs of the State following the trichotomy of power theory embedded in the constitution.

The answer to last question (e) will also decide the ability and limitations of parliament to amend the constitution and will make the position clear as to whether or not parliament can curtail the powers of the SCP. If the answer is affirmative then the parliament may amend the constitution accordingly. Moreover, if the GOP can afford to spend additional time then it can send a reference based only on question (e); if the SCP assents then parliament may amend the constitution freely, and if not then the GOP may send another reference later based on the first three questions (a-c).

7.7 Recommendations on Domestic Statutory Framework

The significance of the domestic statutory framework in stimulation of FDI has already been discussed in chapter 6 where several flaws and weaknesses in domestic laws have also been exposed. Therefore, the following recommendations are made to improve the level of protection afforded to foreign investors under Pakistani laws.

7.7.1 Constitution of Pakistan 1973

Considering the debate carried out in chapter 6 on Arts 18 and 24 of the constitution of Pakistan, it is recommended that, for the expression 'person' as cited in Art 24²³ the phrase 'foreign investor' shall be added in Art 24 through constitutional amendment and be read as 'No person including foreign investor shall be compulsorily deprived...' For further clarity about the scope of 'foreign investor', it shall also be defined that, who falls within meaning of 'foreign investor' under the constitution.

7.7.2 The Foreign Private Investment (Promotion & Protection) Act 1976

The FPIA was the first Act which dealt with the issues of foreign investors; however, despite the elapse of several decades, no attempt has been made to revolutionise it in accordance with changing circumstances. The weaknesses and flaws discussed in chapter

6 and the fact that the phrases ‘foreign capital’ and ‘foreign private investment’ contained in section 2 of FPIA does not correspond to the latest definition of investment agreed by GOP in several BITs requires some vital amendments. Therefore, it is recommended that, section 2 of the Act shall be amended and following the latest version of Pak BIT or the new Model BIT, the latest definition of ‘foreign investor’ and ‘foreign investment’, along with qualifications of investment provided in BIT recommendations be added.

The scope of the expression ‘industrial undertaking’ is deficient to cover all sectors having FDI, therefore, ‘industrial undertaking’ shall be replaced with “assets and investment of a foreign investor”. Similarly, discretion created for the GOP under FPIA sections 3 & 4 to allow or restrict FDI and specify conditions to sanction FDI are inconsistent with several measures adopted by the GOP to attract FDI. Therefore, it is recommended that, section 3 shall be amended in a manner consistent with the latest investment policy and national interest of Pakistan, whereas following the spirit of section 4, GOP shall specify conditions to sanction FDI.

7.7.3 Protection of Economic Reforms Act 1992

Investigation in chapter 6 demonstrates that PERA 1992 was a significant step to address inconsistency in policy on one hand and also provided a cure against shortcomings in FIPA. However, promulgation of FETRA 1998 has technically abandoned FIPA, and hence wiped out its dynamic features. Enactment of a new law on a similar line to PERA with an additional stabilisation clause guaranteeing consistency in the statutory and policy framework is herein highly recommended.

7.7.5 New arbitration and enforcement laws

In 2011, the GOP enacted two new statutes, the Arbitration (International Investment Dispute) Act 2011²⁴ (“AIIDA”) and the Recognition and Enforcement (Arbitral Agreement and Foreign Arbitral Awards) Act 2011²⁵ (“REAFA”). Apart from a few direct controversies arising out of the provisions of the Acts, the majority of the issues

relate to omission and failure of both Acts to address several vital aspects of recognition and enforcement of foreign arbitral agreements and awards. Inapplicability of DAA in pursuant to section 7 of AIIDA without enacting its alternative has created a vacuum; therefore, it is recommended that the GOP shall incorporate new provisions to fill the gap of DAA and other omissions. New provisions shall provide law in clear terms on:

1. Stay of proceedings and restrictions on parallel proceedings in domestic courts where the ICSID tribunal has seized jurisdiction.
2. Judicial assistance of domestic courts in aid of the ICSID tribunal to collect or preserve evidence, seize and attach all sort of assets subject to the underlying claim.
3. Capacity of domestic courts to grant interim relief by issuing interim injunction and examine, protect and take control of the subject matter of ICSID claim in judicial custody or protection.
4. Given that the original jurisdiction has been entrusted to the High Court, there is only one appeal available, which is before the Supreme Court. The scope of appeal before the SCP against a decision to enforce or refuse the enforcement of award has not been addressed in AIIDA; therefore, it is recommended to add clear provisions to address this omission.
5. Powers of the High Court to refuse the enforcement of ICSID award against the GOP shall also be redefined to harmonize it with the international treaty regime by clarifying the strength of sections 3,4 and 54 of AIIDA read with Arts 54(3) & 55 of the ICSID Convention.
6. In the absence of clear procedural law, the probability of application of CPC on AIIDA proceedings in the future cannot be ignored, which will cause unwarranted delay and create several ambiguities. Therefore, it is further recommended to enact a complete but simple and easing procedural code which shall be applicable on AIIDA and completely debar the likelihood of application of CPC.

The GOP should also make rules pursuant to section 9 of AIIDA regarding procedure applicable on registration of award, notice of intention to commence proceedings for registration of ICSID award, essential requirements and manner to proof, procedure to and essentials for service of notice to respondents, stay against execution either provisional or permanent and other matters which the GOP deems necessary and appropriate.

As well as REAFA is concerned, the fundamental problem embedded in it is the definition of foreign award.²⁶ Therefore, it is recommended that, the scope of foreign award shall be described by making it clear whether the status of foreign award will be determined on the basis of law of arbitration theory or seat of arbitration theory.

1. This study recommends that the status of foreign award shall be determined under the seat of arbitration theory, otherwise law of arbitration theory will pull it into the definition of domestic award and all proceedings will come under DAA and CPC.
2. REAFA clearly denotes CPC as the applicable law. Considering the previous debate on CPC, it is recommended that a simple and easing procedural law shall be enacted and CPC shall be completely replaced.
3. REAFA does not completely outlaw the DAA, which gives vast authority to domestic courts to import any provision of the DAA and refuse the enforcement. Therefore, repealing the DAA is highly desirable for smooth functioning and better results of REAFA; however, before doing so, alternatives to fundamental aspects of the DAA shall be incorporated in a manner discussed in the recommendation of AIIDA.
4. Section 9 of REAFA entails the GOP to make rules and specify procedure applicable on REAFA; however, like AIIDA, the GOP has not made a single rule. Therefore, it is recommended that the GOP shall make procedural rules

applicable on REAFA in a similar manner mentioned in recommendations for AIIDA.

CHAPTER 8: CONCLUSION

The investigation conducted has found foreign direct investment (“FDI”) as an aspect of social and economic change, and a prime way of transferring capital, technology and administrative skills to the host country. Foreign investors merge together the functions of domestic firms into an international network which gives domestic production of the host country access to international markets. As a result, this increases economic growth and expands exports and international trade. Trade-oriented FDI boosts export demand which enhances supply; this, yet again, can be seen as a benefit to the host economy.

Investors are constantly keen to invest their capital where profit margins are excellent. Availability of vast and varied natural resources, easy access to large consumer markets, cheap manpower and low production costs are influential factors, amongst others, to persuade foreign investors to make cross-border investment. Due to cheap labour, raw materials and likely opportunities to tailor favourable terms, developing countries are always appealing to foreign investors. Developing economies strive to attract FDI, as they lack modern technology and investment to develop and progress their industrial, agriculture and service sectors. Supporters of FDI argue that besides risk-sharing it also plays a critical role in the development of the host economy in comparison to other types of capital flow. It results in enhancement of the economy, reduction of poverty and boosts potential jobs, especially in underdeveloped countries like Pakistan.

The assertion of the Board of Investment of Pakistan (“BOI”) that these primary essential elements are sufficiently available in Pakistan and that hence it is a perfect market and location for FDI appears to be well-founded. Consequently, this study has further examined the role of FDI in Pakistan as being the key to growth of Pakistan’s economy in previous decades and likelihood in the future. Factors important in foreign investors’ decisions on investment within the country have also been covered, mainly focusing on economic attractions and legal protections afforded to FDI in Pakistan.

The study has acknowledged three potential traditional trends having the ability to influence the existing and inward flow of new FDI, namely; inconsistency in economic policies, signing bilateral investment treaties (“BITs”) without meaningful negotiations and lastly judicial activism. The study also covers the protection afforded to FDI under the domestic laws of Pakistan. Future needs of the Government of Pakistan (“GOP”) and

probable sectors where FDI is required have also been taken into account while making recommendations and suggesting reforms.

The economic policies implemented by successive Pakistani governments in past decades have resulted in variation in FDI flow. Political instability, serious allegations of corruption and shady deals by State entities have been perceived as the driving forces behind the first traditional approach namely; inconsistency in the policies. This approach has generated additional associated risks with FDI such as fluctuation in the currency exchange rate, privatisation and import policies, production fiscal risks, changing fiscal terms, contractual provisions etc., resulting in notable fluctuation in flow of FDI and leaving varying impacts on Pakistan's economy.

As said earlier, political instability is seen to be one of the main driving forces which led towards inconsistency in the policies. It has its origins within chronic corruption, intervention in departments and authorities, the negative attitude of politicians towards each other and their welcoming attitude for the military regime. The vast majority of the governments have been removed by successive heads of State or military generals on the demand of opposition parties under charges of corruption and interference within affairs of other authorities. This has not taught the politicians any meaningful lessons and they continue to conduct their business in the same way. They have simply failed to understand this has an impact on financial instability and causes economic turmoil within the country. The government has inadequate control over the military, and has been undermined by scuffles with the judiciary. Thus, inconveniences in originating and executing policies are likely to continue.

Pakistan has also had to overcome problems with inflation and currency on numerous occasions. A decline in Pakistan's currency since 2007 has confirmed it as a problem which had to be tackled. Maintaining currency in a bank account, or in a fixed term deposit, renders the saver open to inflation risks because one's return would be lower than the rate of inflation, so this threat also prevails consistently when investing in Pakistan. These kinds of threats could be taken as a common commercial risk and an integral part of corporate decision-making in the States like Pakistan which offer best location and perfect market. Foreign investors may earn maximum profit by encountering such threats by good utilising their business skills and knowledge. The host

State such GOP may also offer additional incentives to reduce the negative effects of such threats.

Investigation into the first traditional trend further highlights that Pakistan was an agricultural State upon attaining independence in 1947. The industrial capability of Pakistan was small for processing locally produced agricultural raw material. This therefore meant successive governments ought to advance the country's industrial capacity. In order to achieve this goal, various policies were adopted with the primary focus on either the private or public sector. Government policies in the 1960s were mainly aimed at encouraging the private sector. In the 1970s, the public sector was given a governing role. In the 1980s and 1990s, the private sector was yet again entrusted with a leading role. In particular, as in the 1990s, Pakistan adopted liberal, market-oriented policies and declared the private sector the engine of economic growth. Pakistan also presented an appealing package of incentives to foreign investors in 2000 which led to progress in attraction of FDI.

The reforms implemented by GOP in the beginning of 2000 for protection and attraction of FDI brought FDI-friendly countries to Pakistan and were considered bold and commendable steps by GOP. In the early half of the 2000s, there was huge investment in the real estate, construction, telecom, IT, electronic media, and privatisation, energy and banking sectors. As a result of the investments and new technologies, Pakistan enjoyed a boost in the economy, stability in the currency exchange rate, and increase in GDP etc. However, since the new democratic government sworn in 2008, there has been a sharp decline in FDI, foreign reserves, GDP and the PKR exchange rate. As a result it led to a rise in inflation rate, trade deficit and negative effects on balance of payments. These all together forced the government to borrow from the IMF to meet its requirements. A further direct effect of investments in early 2000 meant electricity demand increased, which in turn lead to severe power shortages within the country. In this context, it is noteworthy that, besides hydro and thermal energy, Pakistan has a vast capacity to generate solar, wind, coal and biomass energy which provide bright and long-term opportunities to foreign investors to earn a healthy profit. Considering this and to meet the internal demand for electricity the government declared the power sector its top priority for investment and offered a variety of incentives to encourage investors to make investments in the power sector.

Fluctuation in the inward flow of FDI as result of inconsistency in the policies of GOP discussed above demonstrates that policies of host countries play a central role in cross-border investors' decisions to choose a certain market or sector. The host countries can instigate policies which may encourage foreign participation in the host economies. Moreover, the host country's policies are of great assistance in channelling investment flow towards sectors considered to be of real importance to the country's progress.

The second trend signing BITs without meaningful and proper negotiations, has been examined in terms of selected BITs and past and present arbitration treaty cases against Pakistan which have also been evaluated with the latest developments in treaty arbitration jurisprudence. Successive Pakistani governments have been found executing BITs mainly without any meaningful negotiations. The main purpose has been for political publicity, and photo shoots of the prime ministers and presidents during their foreign trips. The investigation showed a total lack of competency, skill and know-how to negotiate and draft BITs on the part of GOP.

Investigation into Pakistan's selected BITs in respect of arbitration cases mirrors GOP's custom of executing BITs without negotiation or negotiating on standard terms. Apart from Pak-German BIT of 1959, the BITs did not contain any justification notes to prove negotiations on BITs had ever been held. Only the Pak-German BIT 1959 contained some exchange of notes as annexure to elaborate certain terms contained in the BIT. Various investigations have revealed that selected BITs have set standard pro forma terms. There has been a slight improvement insofar as certain provisions have been observed in the new-generation BITs. At first sight, it seems that it reflects the outcome of treaty claims against Pakistan; unfortunately, as demonstrated, that is not the case. The provisions have been added by counter-signatory of the treaties and GOP has ignored previous lessons. It is somewhat strange that whilst executing new BITs or even model BITs GOP did not consider Pakistan's regional and domestic political, economic, financial and legal circumstances and needs.

The various investigations into BITs suggest that Attorney General ("AG") Makhdoom Ali Khan was correct when he said, 'BITs were signed without proper consultation in haphazard manner'. Existence of this approach is reaffirmed by BOI in terms of its Investment Policy 2013. This implies that until now BOI has conducted negotiations in, as the AG put it, a 'whimsical' manner. It has simply failed to consider the legal and

economic consequences involved. Pakistan has received a number of compensation claims from investors over the past years, most notably *SGS* and *Bayindir Insaat* who sued Pakistan at the International Centre for Settlement of Investment Disputes (“ICSID”); other examples include *Karkey*, *Tethyan* and *Agility*. However, it is not prudent to suggest avoiding BITs just because of treaty claims, the reason being it would raise foreign investors’ concerns regarding protection afforded to them in Pakistan. What has occurred cannot wholly be attributed to BITs, the reason being due to lack of negotiation skills and knowledge, which are fundamental. Negative outcomes of BIT can be addressed by understanding the latest developments on treaty jurisprudence and correlating this with Pakistan’s needs. The domestic legal system, statutory regime and filling the flaws in policy-making would improve trust for foreign investors.

Research on the rising approach of judicial activism has found an assertive role that the higher judiciary is playing in Pakistan. Expansion of public interest litigation (“PIL”) for enforcement of fundamental rights under unique *suo moto* jurisdiction has enabled the Supreme Court of Pakistan (“SCP”) to interfere in commercial and FDI matters directly. In employing *suo moto* and original jurisdiction the SCP has invalidated and scrapped several investment agreements involving FDI. Charges of corruption and kickbacks against State entities for awarding multi-million dollar deals to foreign investors provided opportunities to the SCP to exercise its judicial powers.

This study has acknowledged the USA as the pioneer of judicial activism for all countries that have a written constitution. Judicial activism as seen in the USA confirms that the US Supreme Court never hesitated to overrule a statute or any act of Congress contrary to the constitution; judicial precedents handed down in the US jurisdiction include *Marbury v Madison* (1803), *McCullough v Maryland* (1819), *Brown v Board of Education* (1954) and *National Federation of Independent Business v Secretary of Health and Human Services* (2012).

With regard to Pakistan, its affairs are governed under a written constitution based on the theory of trichotomy of power. Being a common law country, it adheres to the principle of stare decisis embedded in the constitution to follow judicial precedents. However, judicial activism in Pakistan is seen to be much different from the USA and other common law jurisdictions. In these jurisdictions at least one petitioner is required who has locus standi to challenge an act of parliament or executive before the court of

competent jurisdiction. This means that a court cannot invoke its constitutional review jurisdiction on an act or statute which apparently looks unconstitutional unless is challenged by an aggrieved person. Contrary to this in Pakistan the SCP does not require a formal petition for exercising its *suo moto* jurisdiction. In the period of judicial activism the SCP expanded the span of PIL. Under command of CJ Iftikhar Chaudhary it demonstrated to be a torch bearer for the rule of law. Therefore, in exercise of original and *suo moto* jurisdiction for enforcement of fundamental rights it obligated the executives to accomplish their duties in accordance with the constitution, law and rules of assembly, and to uphold the 'sovereignty, integrity, solidarity, well-being and prosperity of Pakistan'. The Rental Power Projects ("RPPs") and National Reconciliation Ordinance ("NRO") judgments signify that no one is above the law and that everyone is accountable for their deeds. This therefore shows the need to be vigilant prior to cutting favourable deals through unfair means as the SCP is likely to call shady deals for judicial scrutiny and may apply its judicial wisdom to ascertain the facts. It is apparent from previous case laws that SCP can play a role of inquisitorial tribunal and can pursue to any extent for implementation of its order. It can monitor the investigation through various means, such as allocating the case to the IOs of its choice, cancelling the posting transfer, passing an order of arrest and on failure to comply with this can proceed for contempt of court. The SCP did not allow the executive to interfere in investigations by posting transfer of the IOs or new appointments.

The judiciary has proved its effectiveness in regards to justice and political stability within the country and further has gained the people's faith in the judicial system. The Pakistani public are seen to be huge supporters of judicial activism. An admirable majority of the lawyer community, civil society and media are behind the judiciary. Their support has reinforced the constitutional authority of the SCP as demonstrated earlier. It is clear that in the specific political, social and economic environment there is no question about the desirability of judicial activism. The Pakistani public being the ultimate beneficiary do not concern themselves with constitutionality or any repercussion of judicial activism.

Further investigation reveals that, to stop the other organs of the State from abusing their power and authority, the SCP appeared to be encroaching upon their spheres. By expanding the scope of PIL the SCP has brought other matters within its jurisdiction. The

aggressive exercise of judicial authority has shown to have a negative effect as demonstrated in *Reko Diq* and *Rental Power*. Consequently, it also had huge financial implications, but one cannot forget the elements of corruption, bribery and misuse of power by State entities with the connivance of foreign investors. At the same time, the use of *suo moto* by the SCP is also seen to be contrary to the standard of trichotomy of power theory embedded in the constitution of Pakistan. The investigations disclose that the constitution does not confer *suo moto* powers upon the High Courts (“HCs”). Exercise of *suo moto* by the HCs is in clear breach of the constitution and settled principles of laws/judicial precedents. Moreover, the judgment of Baluchistan High Court (“BHC”) is seen as destructive and challenging to the constitution and judicial precedents. The SCP appeared idle on the exercise of *suo moto* by HCs and did not even attempt to question their ability to take *suo moto*. The extension in PIL, *suo moto* by HCs and violation of stare decisis in ignoring previous judicial precedents causes indecision on applicability, existence and future of prevailing laws.

As noted, a report and letter by the chairman of the National Accountability Bureau (“NAB”) uncovered serious anxiety prevailing within functionaries of other organs of the State on legitimacy of the exercise of *suo moto* jurisdiction by the SCP in every matter. It is imperative that administration of justice is credible and impartial. This will in essence avoid any concerns being raised in respect of the credibility of the SCP. It would be catastrophic for the judicial system and administration of justice if SCP’s credibility is tarnished or tainted. To balance the role and authority of the SCP, checks and balances are a fundamental necessity. Failure to address this can result in the SCP taking over the roles of the executive and the legislature in the name of interpretation and enforcement of fundamental rights and PIL.

This study has differentiated judicial activism and judicial interference and argued that there is a fine line between both, and encroaching on the sphere of other State organs may possibly convert judicial activism into judicial interference. It is essential for SCP and parliament to draw a line between desired and undesired judicial activism and distinguish judicial activism and judicial interference. Where the purpose can be fulfilled by implementing alternative measures, the SCP must pursue judicial restraint theory and avoid encroaching upon the spheres of other organs of the State.

The investigations into supremacy of parliament and constitution conducted to find solutions to judicial interference revealed that Pakistan's constitution is not a rigid¹ constitution as compared to Germany and France's constitutions. Its characteristics can be modified by adhering to the procedure of the constitution; there is no special restriction on amendment except Art 239(4). The legislature has the power to amend any provision of the constitution without restriction. Despite salient features of the constitution, superior courts of Pakistan have continually rejected the doctrine of a basic structure. To certify the certainty regarding statutes and settled principles of law, the principle of stare decisis is embodied within the constitution of Pakistan. However, in the eighteenth amendment case the SCP gave the impression of ignoring the judicial precedents as well as drifting away from the earlier position of the apex courts. The SCP pointed out that independence of the judiciary is a fundamental aspect of the constitution. This resulted in the executive and legislature passing the nineteenth amendment to the constitution as desired by the SCP. This shows that any effort to restrict the power of the SCP will not be successful as independence of the judiciary is guaranteed and protected by the constitution.

Notwithstanding to constitutional prerequisite to amend the constitution with at least two third majority of both the houses of the parliament there was not any uncertainty on parliament's power to pass any amendment. Therefore, it was the norm to say the parliament is supreme and constitution of Pakistan is not a rigid constitution. Moreover, parliament could cure judicial activism by restraining powers of the judiciary, outlining distinctive powers of executive, legislature and judiciary. However, considering the outcomes of the eighteenth amendment case and annulment of the Contempt of Court Act 2012², it is very unlikely that an Act of parliament or constitutional amendment would address the problem of judicial activism or judicial interference. Any Act or an attempt is subject to judicial review and is likely to be struck down by the SCP. A recent similar controversy over parliament's power to amend the constitution contrary to its basic structure and curtailing the powers of the conventional courts came into limelight in January 2015. The parliament has unanimously passed 21st amendment in the constitution

to establish military courts to hear the matters of terrorism. Seven different petitioners including Lahore High Court Bar Association have challenged this amendment in the SCP contending that amendment amounts to curtailing the powers of the judiciary by establishing parallel courts. Therefore, this amendment is contradictory to the basic structure of the constitution whereby independence of judiciary is guaranteed. The SCP has accepted the petition for hearing under original jurisdiction and has constituted a three member bench headed by the CJP.³ On the question of powers of the court is could be seen in recent days the parliament unanimously. This simply means that Pakistan's contemporary constitutional history is at a dead end. The only way out is for it to pass through the channel of the Supreme Court of Pakistan.

In summary, all three trends as a whole have shown that Pakistan is open to costly international arbitrations initiated by foreign investors moreover, they have affected FDI negatively. This study in its entirety is enthusiastic to develop a balanced approach between Pakistan and foreign investors by proposing some solution and cure for the traditional approaches and in turn enable GOP to attract the required FDI in the desired sectors. Therefore, the municipal laws of Pakistan relating to FDI have also been examined as the domestic statutory regime demonstrates the level of desire of the host State to attract FDI. The study found some enthusiasm on the part of GOP to legislate to harmonise its domestic laws with changing global trends. It has enacted a variety of laws in different periods. Some key treaty protections have been seen as part of the constitution and domestic laws, such as protection against direct or indirect expropriation without due process of law and prompt compensation, fair and equitable treatment, national treatment, right to repatriate money, guarantee against change in statutory or policy framework. Incorporation of treaty provisions in the constitution and domestic laws indicate the determination of GOP to attract and protect FDI in its territory. Particularly due to the strict procedure to amend the constitution, the guarantees provided under Art 24 of the constitution have their own significance. Nevertheless, this study does not conclude that everything is satisfactory and ideal under the domestic statutory and policy regime. There

are many flaws and lacunas in the domestic laws which foreign investors can take as an open threat to their investment; hence, these require vital improvement and amendment.

It has been seen that some of the statutes, e.g. Arbitration Act 1940, Foreign Private Investment Act 1976, are significantly outdated. They neither meet contemporary requirements nor address the current issues arising out of development of the investment and treaty regime. Besides, these laws have never been amended, nor is there any judicial precedent available to answer the current problems concerning FDI. It is observed that, on one hand the GOP showed its keenness to protect its economic reforms in terms of Protection of Economic Reforms Act 1992, whereas on the other hand, after the nuclear tests, it tarnished its positive efforts by withdrawing the statutory protection by means of FETRA 1998. The ability of GOP to withdraw any statutory guarantee at any point of time also contributed in raising foreign investors' concerns about the sanctity of statutory and contractual pledges and protections.

It has also been observed that several legal instruments which deal with FDI entail for legal proceedings under the law of the host State. However, being dissatisfied with the domestic regime, the investors were seen attempting to import the BIT provisions to avoid the domestic laws of Pakistan. Considering the significance of domestic laws in stimulation of FDI on one hand and dissatisfaction of foreign investors upon Pakistan's domestic legal regime on the other hand, the study emphasises the great need of improving Pakistan's domestic legal regime to restore the confidence of foreign investors. GOP is required to observe its international commitments and adopt a vigilant approach towards legal instruments enforced in the country. Following its international obligations the GOP has enacted two statutes to ratify the NYC and ICSID Conventions in Pakistani municipal laws. For better and effective enforcement of both the statutes the GOP has empowered under the Acts to make applicable rules. Nevertheless, besides several other critical omissions in both the statutes, the GOP has not exercised its statutory powers to make the applicable rules regarding both the statutes. Such negligence communicates negative messages to relevant quarters about the fair intentions of GOP and leaves negative impact on existing and inward flow of FDI. It may be concluded that Pakistan should not overshadow its perfect location and market by weaknesses of domestic statutes and traditional approaches investigated in this study. The

recommendations made in chapter 7 provide fundamentals for addressing the three traditional approaches and also imperatives for the domestic legal system.

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APPENDIX 1: Bilateral Investment Treaties (BITs) with Pakistan

Adapted from: <http://boi.gov.pk/InvestmentGuide/BITs.aspx> with additional data for Bahrain's date of signing and minor typographical corrections*.

Country / Organization	Signing Date	Facsimile (low quality) of Bilateral Investment Treaty
Australia	07.02.1998	http://www.iisd.org/pdf/2006/investment_pakistan_australia.pdf
Azerbaijan	09.10.1995	http://boi.gov.pk/userfiles1/file/BITS/Azerbaijan.pdf
Bahrain	18.04.2014	http://boi.gov.pk/userfiles1/file/BITS/Bahrain.pdf
Bangladesh	24.04.1995*	http://boi.gov.pk/userfiles1/file/BITS/Bangladesh.pdf
Belarus	22.01.1997	http://boi.gov.pk/userfiles1/file/BITS/Belarus.pdf
Belgo-Luxemburg Economic Union	23.04.1998	http://boi.gov.pk/userfiles1/file/BITS/Belgo.pdf
Bosnia	04.09.2001	http://boi.gov.pk/userfiles1/file/BITS/Bosnia.pdf
Bulgaria	12.02.2002	http://boi.gov.pk/userfiles1/file/BITS/Bulgaria.pdf
Cambodia	27.04.2004	http://boi.gov.pk/userfiles1/file/BITS/Cambodia.pdf
China	12.02.1989	http://boi.gov.pk/userfiles1/file/BITS/china.pdf
Czech Republic	07.05.1999	http://boi.gov.pk/userfiles1/file/BITS/Czech.pdf
Denmark	18.07.1996*	http://boi.gov.pk/userfiles1/file/BITS/Denmark.pdf
Egypt	16.04.2000	http://boi.gov.pk/userfiles1/file/BITS/Egypt.pdf
France	01.06.1983	http://boi.gov.pk/userfiles1/file/BITS/France.pdf
Germany	01.12.2009	http://boi.gov.pk/userfiles1/file/BITS/Germany.pdf
Indonesia	08.03.1996	http://boi.gov.pk/userfiles1/file/BITS/Indonesia.pdf
Iran	08.11.1995	http://boi.gov.pk/userfiles1/file/BITS/Iran.pdf
Italy	19.07.1997	http://boi.gov.pk/userfiles1/file/BITS/Italy.pdf
Japan	10.03.1998	http://boi.gov.pk/userfiles1/file/BITS/Japan.pdf
Kazakhstan	08.12.2003	http://boi.gov.pk/userfiles1/file/BITS/Kazakhstan.pdf
Kuwait	14.02.2011	http://boi.gov.pk/userfiles1/file/BITS/Kuwait.pdf
Kyrgyz Republic	23.08.1995	http://boi.gov.pk/userfiles1/file/BITS/Kyrgyz.pdf
Lebanon	09.01.2001	http://boi.gov.pk/userfiles1/file/BITS/Lebanon.pdf
Laos*	23.04.2004	http://boi.gov.pk/userfiles1/file/BITS/Laos.pdf
Malaysia	07.07.1995	http://boi.gov.pk/userfiles1/file/BITS/Malaysia.pdf
Mauritius	03.04.1997	http://boi.gov.pk/userfiles1/file/BITS/Mauritius.pdf
Morocco	16.04.2001	http://boi.gov.pk/userfiles1/file/BITS/Morocco.pdf
Netherlands	04.10.1988	http://boi.gov.pk/userfiles1/file/BITS/Netherlands.pdf
Oman	09.11.1997	http://boi.gov.pk/userfiles1/file/BITS/Oman.pdf
Philippines	23.04.1999	http://boi.gov.pk/userfiles1/file/BITS/Philippines.pdf
Portugal	17.04.1995	http://boi.gov.pk/userfiles1/file/BITS/Portuguese.pdf
Qatar	06.04.1999	http://boi.gov.pk/userfiles1/file/BITS/Qatar.pdf
Romania	10.07.1995	http://boi.gov.pk/userfiles1/file/BITS/Romania.pdf
Singapore	08.03.1995	http://boi.gov.pk/userfiles1/file/BITS/Singapore.pdf
South Korea	25.05.1988	http://boi.gov.pk/userfiles1/file/BITS/South%20Korea.pdf
Spain	15.09.1994	http://boi.gov.pk/userfiles1/file/BITS/Spain.pdf
Sri Lanka	20.12.1997	http://boi.gov.pk/userfiles1/file/BITS/SriLanka.pdf
Sweden	12.03.1981	http://boi.gov.pk/userfiles1/file/BITS/Sweden.pdf
Switzerland	11.07.1995	http://boi.gov.pk/userfiles1/file/BITS/Switzerland.pdf

Syria	25.04.1995	http://boi.gov.pk/userfiles1/file/BITS/Syria.pdf
Tajikistan	13.05.2004	http://boi.gov.pk/userfiles1/file/BITS/Tajikistan.pdf
Tunisia	18.04.1996	http://boi.gov.pk/userfiles1/file/BITS/Tunisia.pdf
Turkey	22.05.2012	http://boi.gov.pk/userfiles1/file/BITS/Turkey.pdf
Turkmenistan*	26.10.1994	http://boi.gov.pk/userfiles1/file/BITS/Turkmenistan.pdf
U.A.E.	05.11.1995	http://boi.gov.pk/userfiles1/file/BITS/UAE.pdf
United Kingdom	30.11.1994	http://boi.gov.pk/userfiles1/file/BITS/United%20Kingdom.pdf
Uzbekistan	13.08.1992	http://boi.gov.pk/userfiles1/file/BITS/Uzbekistan.pdf
Yemen	11.05.1999	http://boi.gov.pk/userfiles1/file/BITS/Yeman.pdf

* Corrections to the source material are: Bangladesh *041* to *04* (April), Denmark 7 to 07 (July), *Loas* to *Laos*, *Turmenistan* to *Turkmenistan*.

APPENDIX 2: Foreign Investment inflows in Pakistan (US\$ Millions)

Source: <<http://boi.gov.pk/ForeignInvestmentinPakistan.aspx>>

37.1% decrease in Net FDI in 2014-15 (July-August) as compared to 2013-14 (July-August).

Note: Pakistan's fiscal year runs from 1st July till 30th June. The figures in brackets are negative.

Country Wise FDI Inflows (US\$ Millions)

Country	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	Jul-Aug 2014-15
USA	1,309.3	869.9	468.3	238.1	227.7	223.0	206.4	36.2
UK	460.2	263.4	294.6	207.1	205.8	632.3	115.9	22.4
U.A.E	589.2	178.1	242.7	284.2	36.6	19.9	8.8	(8.9)
Japan	131.2	74.3	26.8	3.2	29.7	30.7	18.0	8.9
Hong Kong	339.8	156.1	9.9	125.6	80.3	242.6	226.9	27.3
Switzerland	169.3	227.3	170.6	110.5	127.1	149.0	226.3	(2.5)
Saudi Arabia	46.2	(92.3)	(133.8)	6.5	(79.9)	3.2	(47.8)	(9.8)
Germany	69.6	76.9	53.0	21.2	27.2	5.0	(0.5)	0.1
Korea (South)	1.2	2.3	2.3	7.7	25.4	25.8	25.2	(2.1)
Norway	274.9	101.1	0.4	(48.0)	(275.0)	(258.4)	(21.6)	11.4
China	13.7	(101.4)	(3.6)	47.4	126.1	90.6	700.3	(5.7)
Others	2,005.2	1,964.2	1,019.6	631.3	289.7	283.6	173.4	9.8
Total including								
Pvt. Proceeds	5,409.8	3,719.9	2,150.8	1,634.8	820.7	1447.3	1631.3	87.1
Privatisation Proceeds	133.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0
FDI Excluding								
Pvt. Proceeds	5,276.6	3,719.9	2,150.8	1,634.8	820.7	1447.3	1631.3	87.1

Sector Wise FDI Inflows (US\$ Millions)

Sectors	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	Jul-Aug 2014-15
Oil & Gas	634.8	.0	.6	.2	.4	.6	465.1	42.6
Financial Business	1,864.9	707.4	163.0	310.1	64.4	314.2	156.8	23.7
Textiles	30.1	36.9	27.8	25.3	29.8	10.0	3.7	6.9
Trade	175.9	166.6	117.0	53.0	25.3	5.7	(7.6)	10.3
Construction	89.0	93.4	101.6	61.1	72.1	46.0	24.4	2.6
Power	70.3	130.6	(120.6)	155.8	(84.9)	28.4	46.6	5.0
Chemicals	79.3	74.3	112.1	30.5	96.3	71.6	88.4	19.8
Transport	74.2	93.2	132.0	104.6	18.7	44.1	(8.1)	(1.3)
Communication (IT&Telecom)	1,626.8	879.1	291.0	(34.1)	(312.6)	(385.7)	583.3	(24.1)
Others	764.5	763.4	586.3	416.3	282.6	872.6	278.7	1.6
Total including Pvt. Proceeds	5,409.8	3,719.9	2,150.8	1,634.8	820.7	1447.3	1631.3	87.1
Privatisation Proceeds	133.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0
FDI Excluding Pvt. Proceeds	5,276.6	3,719.9	2,150.8	1,634.8	820.7	1447.3	1631.3	87.1

APPENDIX 3: Monthly Average Foreign Exchange Rate (PKR per US\$)

Source: Statistics and Data Warehouse Department, State Bank of Pakistan <www.sbp.org.pk/ecodata/HER-USDollar.xls>

Period	Spot Buying	Spot Selling	Average
Aug 1947 to Jul-55	Parity/Official Exchange Rate		3.3085
Aug-55 to Apr-72	4.7619	4.7775	4.7697
May-72 to Jan-73	11.0000	11.0156	11.0078
Feb-73 to Dec-81	9.9000	9.9156	9.9078

Period	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN
1981-82	9.9078	9.9078	9.9078	9.9078	9.9078	9.9078	10.2509	10.7045	11.1325	11.6691	11.5849	11.9859
1982-83	12.1698	12.2684	12.3607	12.5635	12.4478	12.8654	12.8431	12.8985	12.9050	12.9760	12.9703	13.0378
1983-84	13.2678	13.3867	13.3998	13.3047	13.2378	13.4272	13.6266	13.5398	13.3495	13.5609	13.8735	13.8791
1984-85	14.0671	14.0766	14.2885	14.5456	14.7698	15.1721	15.4749	15.7349	16.0349	15.9243	16.0078	15.9798
1985-86	16.0078	15.9078	16.1386	16.0539	15.9878	15.9878	15.9878	15.9878	15.9878	16.2122	16.5472	16.9358
1986-87	16.7800	16.9145	16.9971	17.0725	17.2578	17.2578	17.2578	17.2578	17.3166	17.3141	17.3433	17.3906
1987-88	17.4916	17.6009	17.5638	17.5954	17.5490	17.4937	17.5091	17.5779	17.6093	17.6440	17.6771	17.8806
1988-89	18.1212	18.2606	18.3619	18.4711	18.7285	18.7301	18.9862	19.3274	19.5327	19.9718	20.9414	21.1528
1989-90	21.1068	21.1027	21.1101	21.1693	21.3565	21.4385	21.4736	21.4736	21.4815	21.7476	21.9582	21.9229
1990-91	21.7944	21.8083	21.7944	21.8440	21.9107	21.9099	22.1296	22.2054	22.5604	23.2502	23.7405	24.1241
1991-92	24.6281	24.7185	24.7154	24.6804	24.7668	24.7914	24.7548	24.7175	24.9234	25.0865	25.1570	25.1891
1992-93	25.1929	25.1854	25.1427	25.2044	25.5080	25.6933	25.9752	26.2669	26.5855	26.7461	26.8686	27.1477
1993-94	28.3871	29.9247	29.9247	30.0903	30.1252	30.1616	30.2910	30.4633	30.5736	30.6164	30.6835	30.7247
1994-95	30.6694	30.6694	30.7267	30.7267	30.7434	30.8319	30.9188	30.9695	30.9688	30.9505	30.9936	31.0517
1995-96	31.2033	31.3563	31.5186	32.1071	34.3357	34.3357	34.3357	34.4353	34.5719	34.7071	34.8496	35.0570

1996-97	35.2821	35.5752	36.6113	38.1608	40.2203	40.2203	40.2203	40.2203	40.2203	40.2564	40.4418	40.4945
1997-98	40.6013	40.6213	40.6213	42.6215	44.1602	44.1602	44.1602	44.1602	44.1974	44.2911	44.1609	44.5940
1998-99¹	46.2633	46.1150	46.1150	46.1150	46.1150	46.1150	46.1150	46.1150	46.1150	46.1150	48.4848	51.7017
1998-99²	46.2633	49.9277	50.0995	50.3784	50.7970	50.0558	49.8663	50.1240	49.9386	50.4115	51.0911	51.7017
1999-00	51.6067	51.6408	51.7284	51.7534	51.7653	51.7647	51.7702	51.7962	51.7912	51.7911	51.7975	52.0452
2000-01	52.5075	53.9820	56.1063	58.1591	57.0032	57.9913	59.0639	59.6205	60.5224	61.0673	61.8291	63.4010
2001-02	64.0905	64.1157	64.1472	62.2097	61.1255	60.5836	60.2011	60.1611	60.1020	60.1232	60.1253	60.1246
2002-03	59.7907	59.5102	59.2578	59.0530	58.5852	58.4162	58.1829	58.0811	57.8675	57.7757	57.7311	57.7429
2003-04	57.7432	57.7877	57.8093	57.5609	57.3342	57.3960	57.3993	57.3601	57.4495	57.4616	57.6753	57.9165
2004-05	58.2777	58.7934	58.9725	60.0311	59.9393	59.5478	59.4452	59.3525	59.3529	59.4031	59.5081	59.6673
2005-06	59.6234	59.6547	59.7593	59.7108	59.7647	59.8076	59.8396	59.8855	60.0070	59.9979	60.0668	60.1618
2006-07	60.2711	60.3180	60.5037	60.5959	60.7282	60.8878	60.8780	60.7321	60.6927	60.7052	60.6718	60.6256
2007-08	60.3978	60.5145	60.6376	60.6795	61.0003	61.1798	62.3667	62.6185	62.7500	63.5556	67.6009	67.2563
2008-09	70.5896	74.2926	77.1668	80.4331	79.9239	78.9238	79.0856	79.4485	80.2355	80.3958	80.5268	80.9574
2009-10	82.0062	82.7716	82.8462	83.2176	83.4540	84.0021	84.5184	84.8991	84.3500	83.9386	84.3318	85.2844
2010-11	85.5031	85.6070	85.7618	85.9416	85.5440	85.7072	85.6778	85.3141	85.3380	84.6278	85.2122	85.7859
2011-12	86.0204	86.6211	87.4744	86.9655	86.9316	89.3402	90.1357	90.6186	90.7135	90.6345	91.2605	94.1151
2012-13	94.3779	94.4660	94.5877	95.3487	95.9926	97.1870	97.4720	97.9687	98.0605	98.3119		

Notes:

(i) Pak-rupee remained linked to Pound Sterling till September, 1971 and subsequently to U.S. Dollar till January, 1982.

(ii) Managed floating exchange rate system was adopted w.e.f. January 8, 1982 under which the value of the rupee was determined on daily basis, with reference to a basket of currencies of Pakistan's major trading partners and competitors.

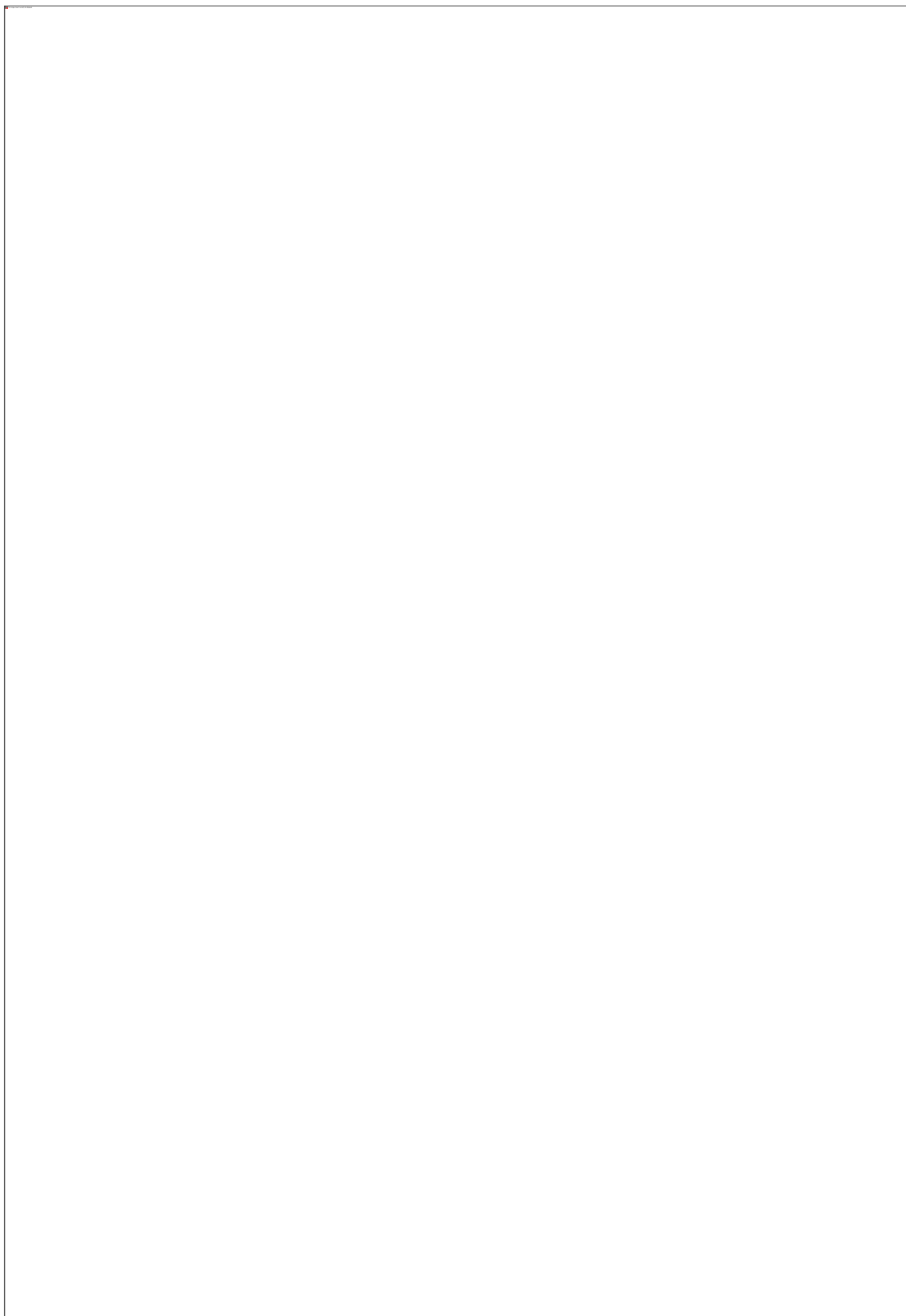
(iii) After nuclear detonation by Pakistan in 1998, a two-tier exchange rate system i.e. ¹official exchange rate and ²floating interbank exchange rate was introduced w.e.f. 22nd July 1998.

(iv) However, effective from 19th May 1999, the exchange rate has been unified, with the introduction of market-based floating exchange rate system, under which the exchange rate is determined by the demand and supply positions in the foreign exchange market. Now, Pakistan is maintaining floating rate, wherein each bank quotes its own exchange rates depending on its short and long position.

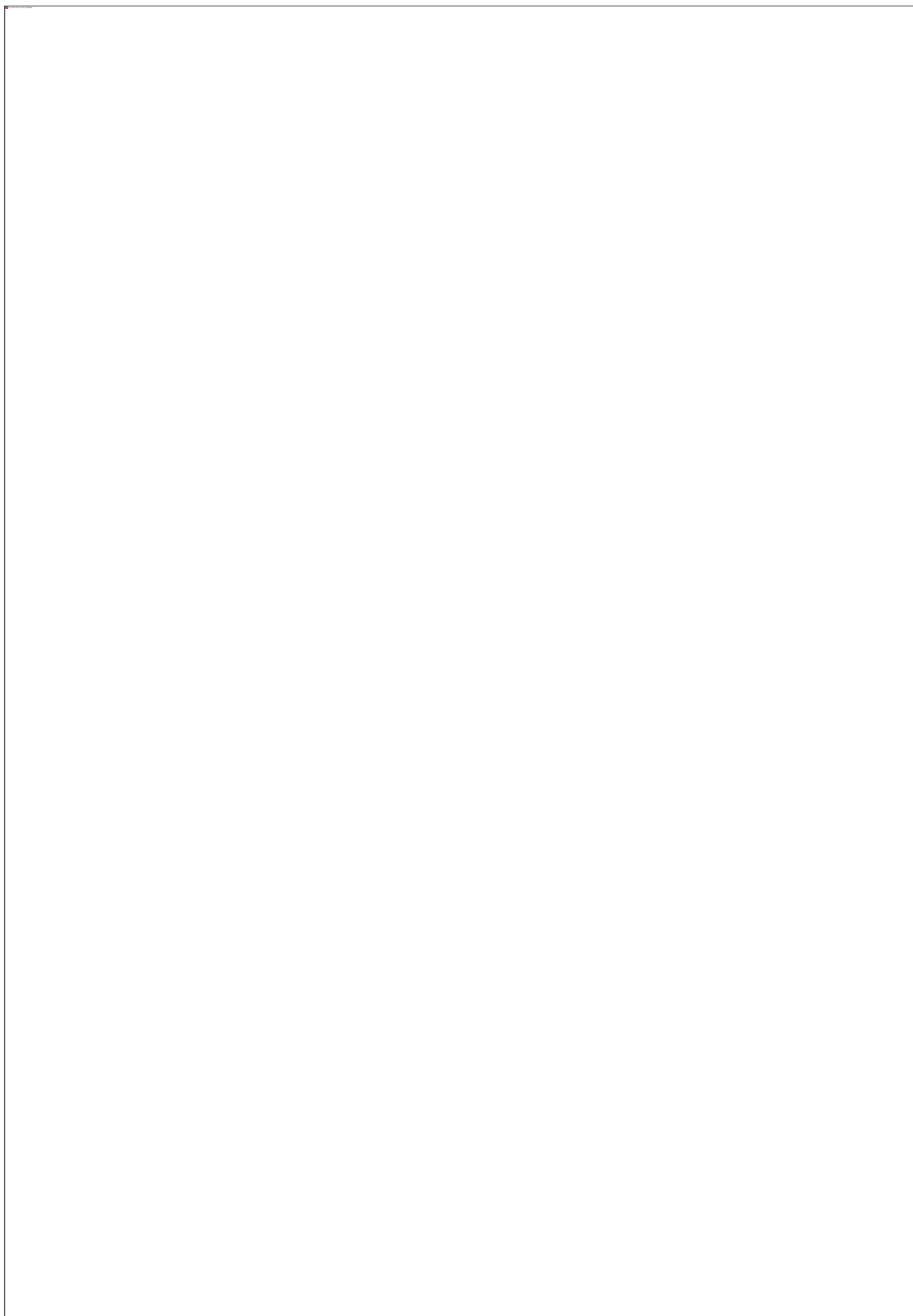
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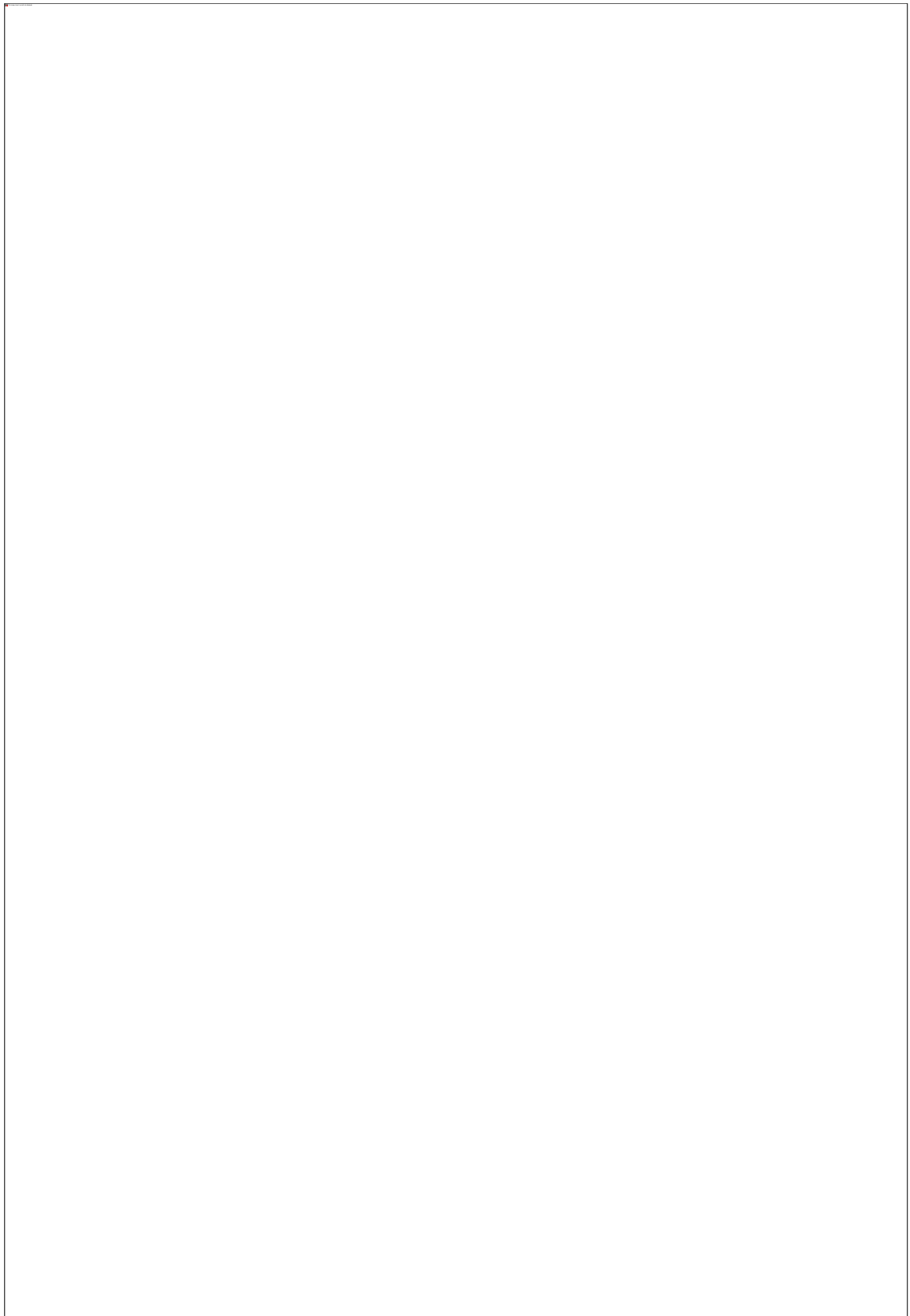
**APPENDIX X: Bilateral Investment Treaty Pakistan and Federal Republic of
Germany 1959**

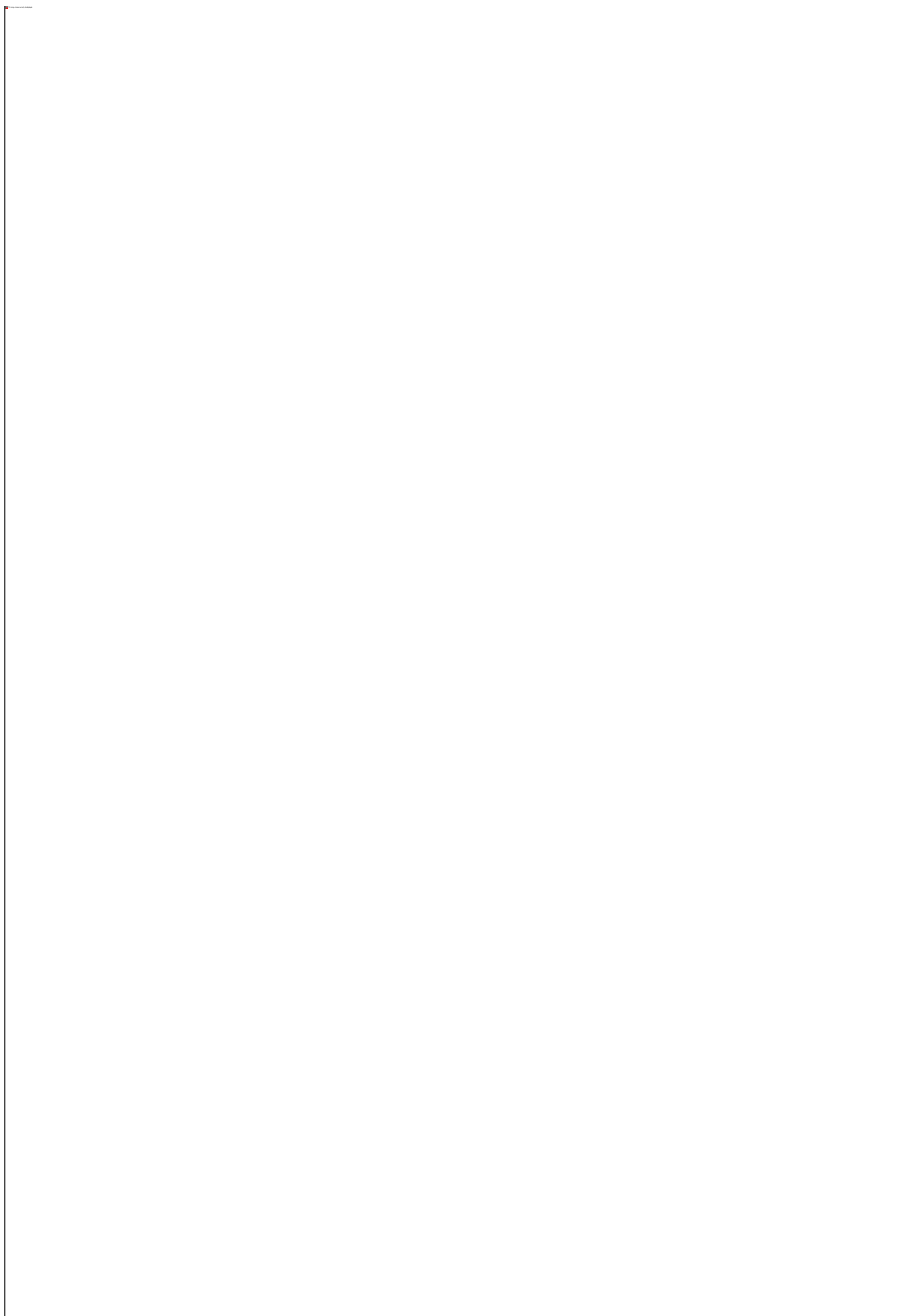


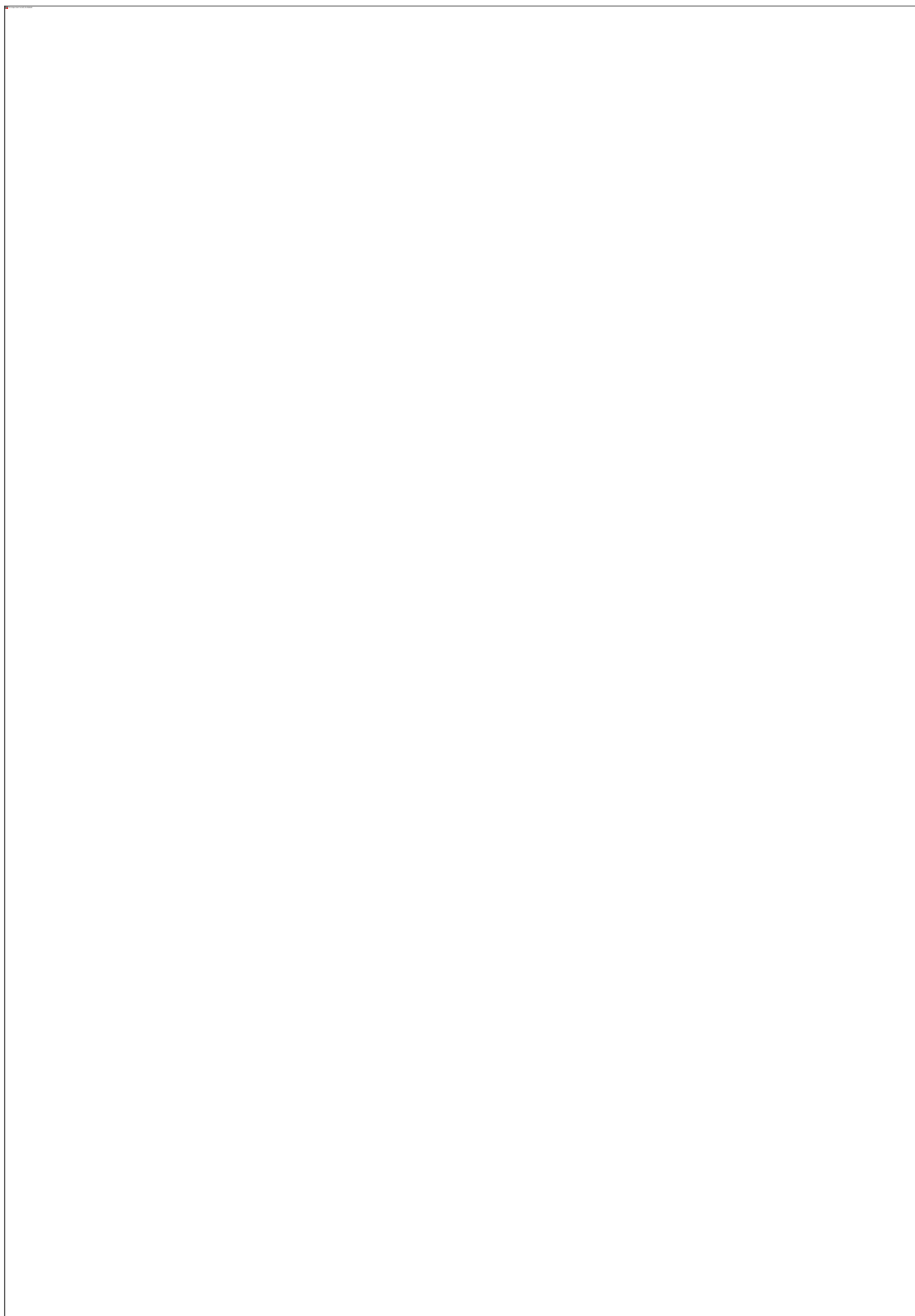


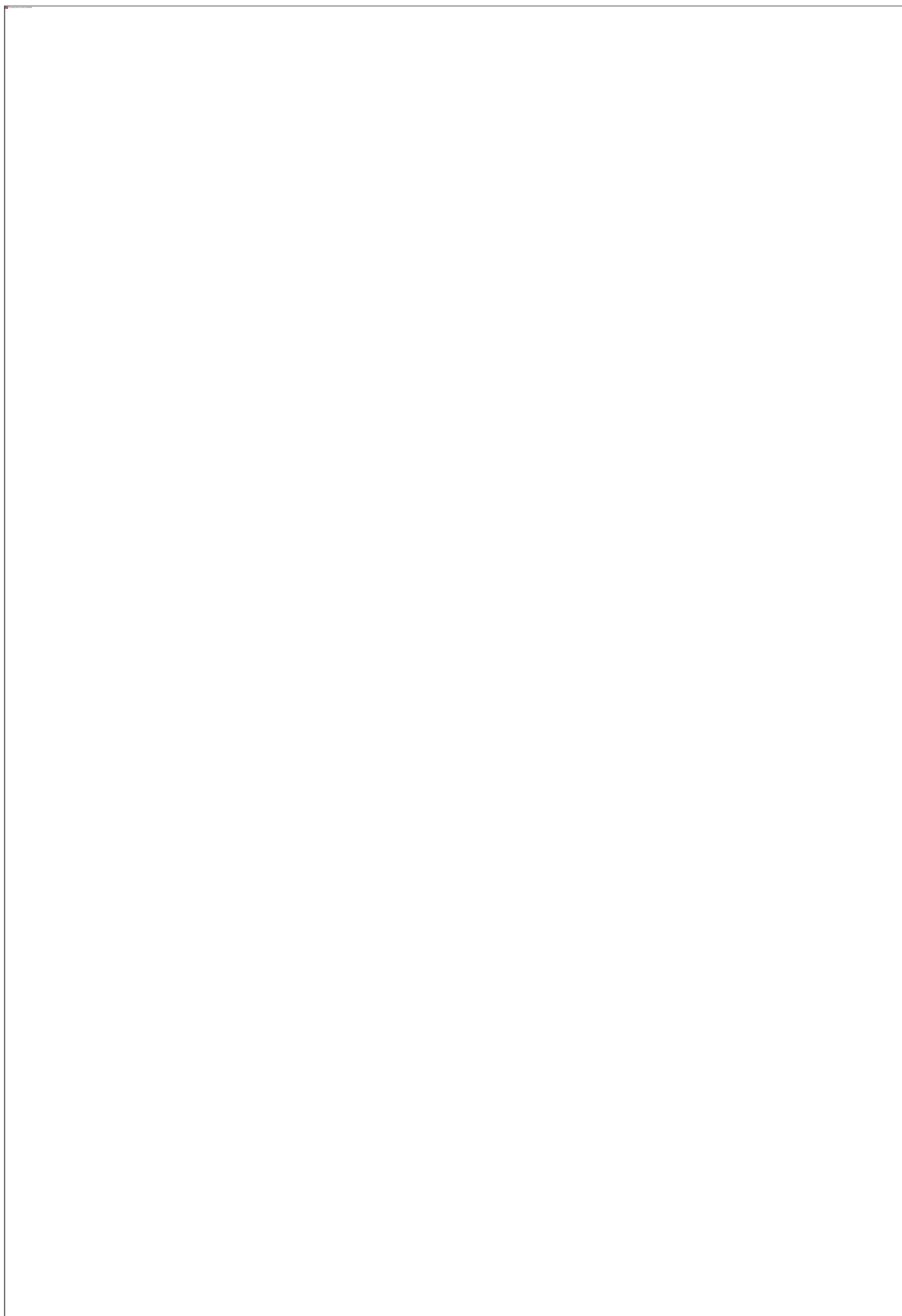












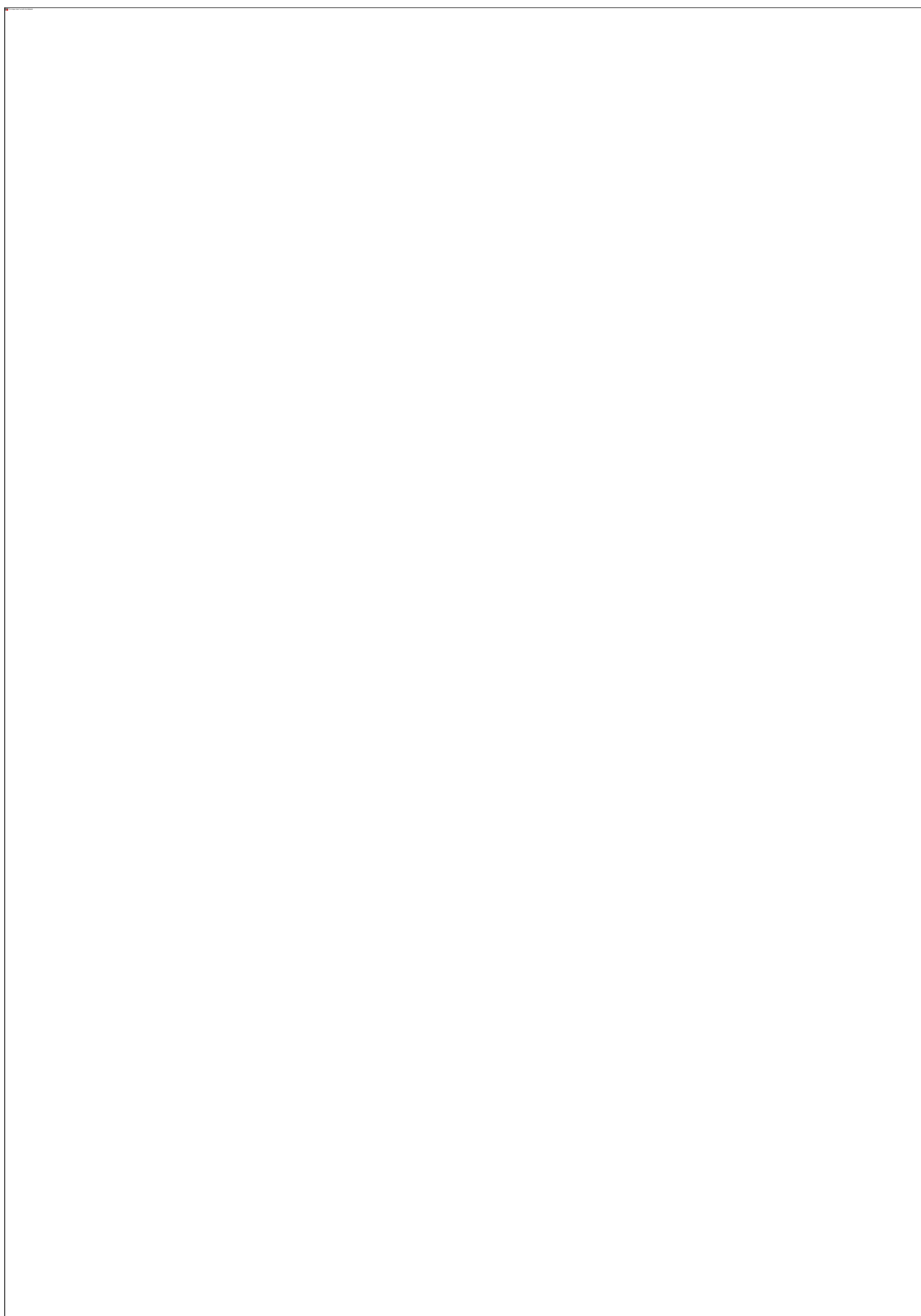


















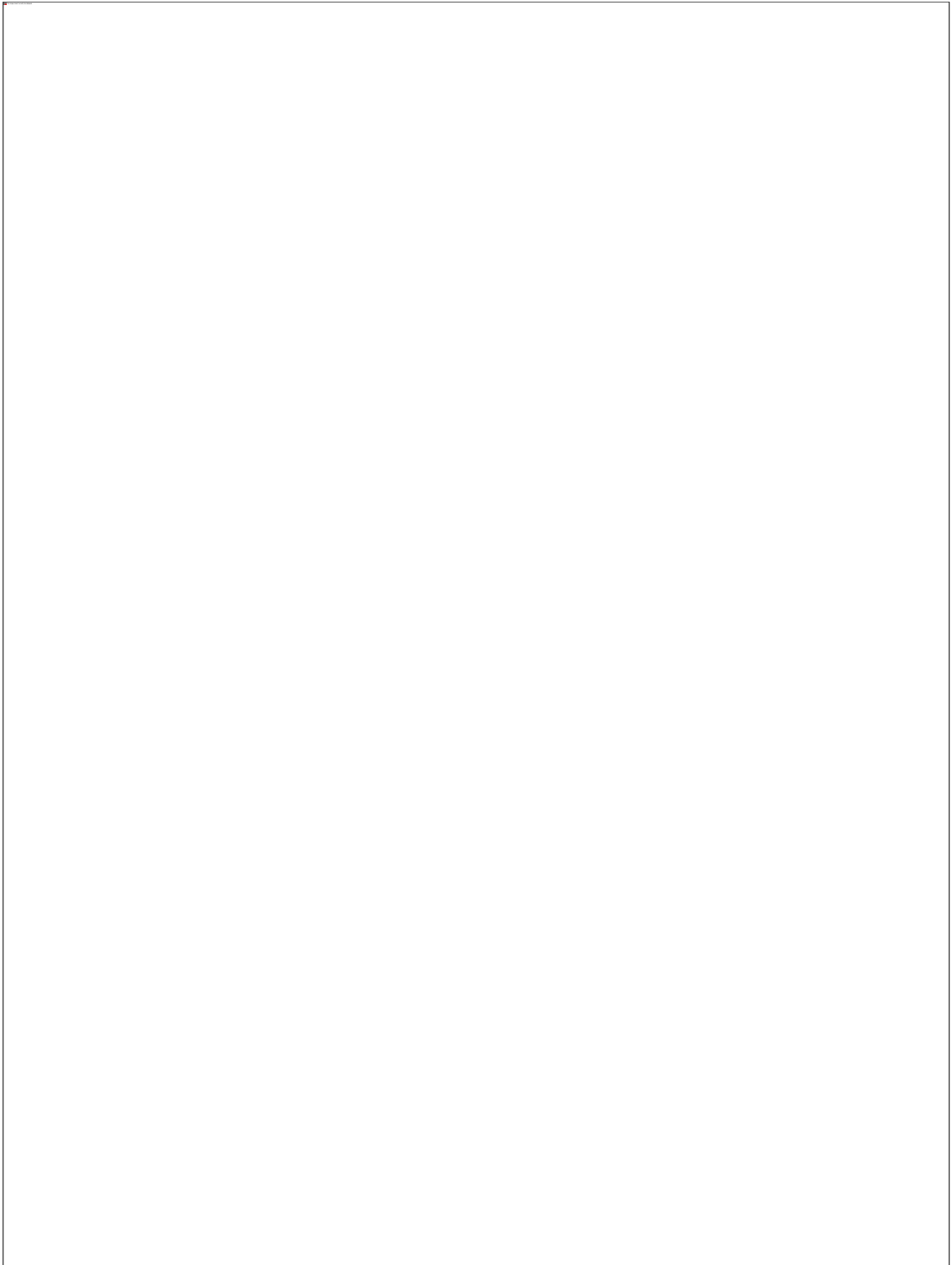














APPENDIX X: Bilateral Investment Treaty Pakistan and Switzerland 1995

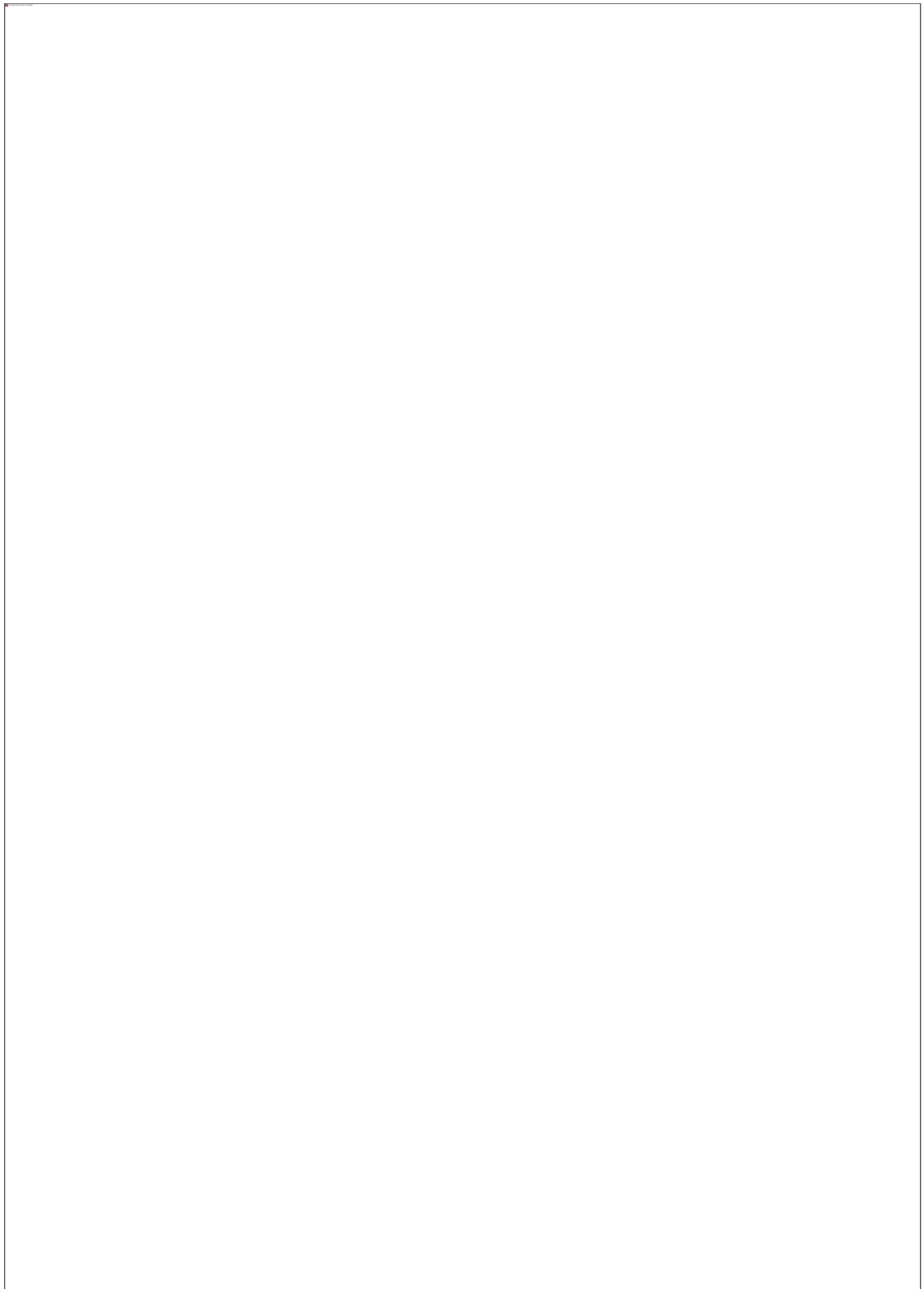




















APPENDIX X: Bilateral Investment Treaty Australia and Pakistan 1998

Agreement between Australia and the Islamic Republic of Pakistan on the Promotion
and Protection of Investments
(Islamabad, 7 February 1998) Entry into force: 14 October
1998
AUSTRALIAN TREATY SERIES

1998 No. 23

AGREEMENT BETWEEN AUSTRALIA AND THE ISLAMIC REPUBLIC OF PAKISTAN ON THE PROMOTION AND PROTECTION OF INVESTMENTS

AUSTRALIA AND THE ISLAMIC REPUBLIC OF PAKISTAN ("the Parties"),

RECOGNISING the importance of promoting the flow of capital for economic activity
and development and aware of its role in expanding economic relations and technical
co-operation between them, particularly with respect to investment by investors of
one Party in the territory of the other Party;

CONSIDERING that investment relations should be promoted and economic co-
operation strengthened in accordance with the internationally accepted principles of
mutual respect for sovereignty, equality, mutual benefit, non-discrimination and
mutual confidence;

ACKNOWLEDGING that investments of investors of one Party in the territory of the
other Party would be made within the framework of the laws of that other Party; and

RECOGNISING that pursuit of these objectives would be facilitated by a clear
statement of principles relating to the protection of investments, combined with rules
designed to render more effective the application of these principles within the
territories of the Parties,

HAVE AGREED as follows:

Article 1

Definitions

1. For the purposes of this Agreement:

(a) "investment" means every kind of asset, owned or controlled by investors of one Party and admitted by the other Party subject to its law and investment policies applicable from time to time and includes:

(i) tangible and intangible property, including rights such as mortgages, liens and other pledges,

(ii) shares, stocks, bonds and debentures and any other form of participation in a company,

(iii) a loan or other claim to money or a claim to performance having economic value,

(iv) intellectual and industrial property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill,

(v) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to engage in agriculture, forestry, fisheries and animal husbandry, to search for, extract or exploit natural resources and to manufacture, use and sell products, and

(vi) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange;

(b) "return" means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, management or technical assistance fees, payments in connection with intellectual property rights, and all other lawful income;

(c) "investor" of a Party means:

(i) a company; or

(ii) a natural person who is a citizen or permanent resident of a Party;

(d) "company" means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised:

(i) under the law of a Party; or

(ii) under the law of a third country and is owned or controlled by an entity described in paragraph 1(d)(i) of this Article or by a natural person who is a citizen or permanent resident of a Party;

regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

(e) "permanent resident" means a natural person whose residence in a Party is not limited as to time under its law;

(f) "freely convertible currency" means a convertible currency as classified by the International Monetary Fund or any currency that is widely traded in international foreign exchange markets;

(g) "territory" in relation to a Party includes the territorial sea, maritime zone or continental shelf where that Party exercises its sovereignty, sovereign rights or jurisdiction in accordance with international law.

2. For the purposes of paragraph 1(a) of this Article, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

3. For the purposes of this Agreement, a natural person or company shall be regarded as controlling a company or an investment if the person or company has a substantial interest in the company or the investment. Any question arising out of this

Agreement concerning the control of a company or an investment shall be resolved to the satisfaction of the Parties.

Article 2

Application of Agreement

1. This Agreement shall apply to investments whenever made.
2. Where a company of a Party is owned or controlled by a citizen or a company of any third country, the Parties may decide jointly in consultation not to extend the rights and benefits of this Agreement to such company.
3. A company duly organised under the law of a Party shall not be treated as an investor of the other Party, but any investments in that company by investors of that other Party shall be protected by this Agreement.
4. This Agreement shall not apply to a company organised under the law of a third country within the meaning of paragraph 1(d)(ii) of Article 1 where the provisions of an investment protection agreement with that country have already been invoked in respect of the same matter.
5. This Agreement shall not apply to a natural person who is a permanent resident but not a citizen of a Party where:
 - (a) the provisions of an investment protection agreement between the other Party and the country of which the person is a citizen have already been invoked in respect of the same matter; or
 - (b) the person is a citizen of the other Party.

Promotion and protection of investments

1. Each Party shall encourage and promote investments in its territory by investors of the other Party and shall, in accordance with its laws and investment policies applicable from time to time, admit investments.
2. Each Party shall ensure fair and equitable treatment in its own territory to investments.
3. Each Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments.
4. This Agreement shall not prevent an investor of one Party from taking advantage of the provisions of any law or policy of the other Party which are more favourable than the provisions of this Agreement.

Article 4

Most favoured nation provision

Each Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country, provided that a Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from:

- (a) any customs union, economic union, free trade area or regional economic integration agreement to which the Party belongs; or
- (b) the provisions of a double taxation agreement with a third country.

Entry and sojourn of personnel

1. Each Party shall, subject to its laws applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons who are investors of the other Party and personnel employed by companies of that other Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.
2. Each Party shall, subject to its laws applicable from time to time, permit investors of the other Party who have made investments in the territory of the first Party to employ within its territory key technical and managerial personnel of their choice regardless of citizenship.

Article 6

Transparency of laws

Each Party shall, with a view to promoting the understanding of its laws that pertain to or affect investments in its territory by investors of the other Party, make such laws public and readily accessible.

Article 7

Expropriation and nationalisation

1. Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the investments of investors of the other Party unless the following conditions are complied with:
 - (a) the expropriation is for a public purpose related to the internal needs of that Party and under due process of law;
 - (b) the expropriation is non-discriminatory; and

(c) the expropriation is accompanied by the payment of prompt, adequate and effective compensation.

2. The compensation referred to in paragraph 1(c) of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation became public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, and other relevant factors.

3. The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate from the date the measures were taken to the date of payment and shall be freely transferable between the territories of the parties. The compensation shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in any other freely convertible currency.

Article 8

Compensation for losses

When a Party adopts any measures relating to losses in respect of investments in its territory by citizens or companies of any other country owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar events, the treatment accorded to investors of the other Party as regards restitution, indemnification, compensation or other settlement shall be no less favourable than that which the first Party accords to citizens or companies of any third country.

Article 9

Transfers

1. Each Party shall, when requested by an investor of the other Party permit all funds of that investor related to an investment in its territory to be transferred freely and without unreasonable delay. Such funds include the following:

- (a) the initial capital plus any additional capital used to maintain or expand the investment; (b) returns;
- (c) proceeds from the sale or partial sale or liquidation of the investment;
- (d) payments made pursuant to a loan agreement or for the losses referred to in Article 8; and
- (e) unspent earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Transfers shall be permitted in freely convertible currency. Unless otherwise agreed by the investor and the Party concerned, transfers shall be made at the exchange rate applying on the date of transfer in accordance with the law of the Party that admitted the investment.

3. Each Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

Article 10

Subrogation

1. If a Party or an agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment, the other Party shall recognise the transfer of any right or title in respect of such investment. The subrogated right or claim shall not be greater than the original right or claim of the investor.

2. Where a Party or an agency of a Party has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party.

Article 11

Consultations between the Parties

The Parties shall consult at the request of either of them on matters concerning the interpretation or application of this Agreement.

Article 12

Settlement of disputes between the Parties

1. The Parties shall endeavour to resolve any dispute between them connected with this Agreement by prompt and friendly consultations and negotiations.
2. If a dispute is not resolved by such means within six months of one Party seeking in writing such negotiations or consultations, it shall be submitted at the request of either Party to an Arbitral Tribunal established in accordance with the provisions of Annex A of this Agreement or, by agreement, to any other international tribunal.

Article 13

Settlement of disputes between a Party and an investor of the other Party

1. In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.
2. If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may:
 - (a) in accordance with the law of the Party which admitted the investment, initiate proceedings before that Party's competent judicial or administrative bodies;
 - (b) if both Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention"), refer the dispute to the International Centre for Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;

(c) if both Parties are not at that time party to the Convention, refer the dispute to an Arbitral Tribunal constituted in accordance with Annex B of this Agreement, or by agreement, to any other arbitral authority.

3. Where a dispute is referred to the Centre pursuant to paragraph 2(b) of this Article:

(a) where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor;

(b) if the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the investor affected shall have the right to choose;

(c) a company which is constituted or incorporated under the law in force in the territory of one Party and in which before the dispute arises the majority of the shares are owned by investors of the other Party shall, in accordance with Article 25(2)(b) of the Convention, be treated for the purposes of the Convention as a company of the other Party.

4. Once an action referred to in paragraph 2 of this Article has been taken, neither Party shall pursue the dispute through diplomatic channels unless:

(a) the relevant judicial or administrative body, the Secretary-General of the Centre, the arbitral authority or tribunal or the conciliation commission, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or

(b) the other Party has failed to abide by or comply with any judgment, award, order or other determination made by the body in question.

5. In any proceeding involving a dispute relating to an investment, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

Article 14

Settlement of disputes between investors of the Parties

Each Party shall in accordance with its law:

- (a) provide investors of the other Party who have made investments within its territory and personnel employed by them for activities associated with investments full access to its competent judicial or administrative bodies in order to afford means of asserting claims and enforcing rights in respect of disputes with its own investors;
- (b) permit its investors to select means of their choice to settle disputes relating to investments with the investors of the other Party, including arbitration conducted in a third country; and
- (c) provide for the recognition and enforcement of any resulting judgments or awards.

Article 15

Entry into force, duration and termination

1. This Agreement shall enter into force thirty days after the date on which the Parties have notified each other that their constitutional requirements for the entry into force of this Agreement have been fulfilled. It shall remain in force for a period of fifteen years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph 2 of this Article.
2. Either Party may terminate this Agreement at any time after it has been in force for fifteen years by giving one year's written notice to the other Party.
3. Notwithstanding termination of this Agreement pursuant to paragraph 2 of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Agreement.

DONE in duplicate at Islamabad on the seventh day of February, 1998, in the English language.

FOR AUSTRALIA: ALEXANDER

DOWNER [Signed:]

FOR THE ISLAMIC REPUBLIC OF PAKISTAN: GOHAR AYUB KHAN

[Signed:]

ANNEX A

1. The Arbitral Tribunal referred to in paragraph 2 of Article 12 shall consist of three persons appointed as follows:

(a) each Party shall appoint one arbitrator;

(b) the arbitrators appointed by the Parties shall, within thirty days of the appointment of the second of them, by agreement, select a third arbitrator who shall be a citizen or permanent resident of a third country which has diplomatic relations with both Parties;

(c) the Parties shall, within thirty days of the selection of the third arbitrator, approve the selection of that arbitrator who shall act as Chairman of the Tribunal.

2. Arbitration proceedings shall be instituted upon notice being given through diplomatic channels by the Party instituting such proceedings to the other Party. Such notice shall contain a statement setting forth in summary form the grounds of the claim, the nature of the relief sought, and the name of the arbitrator appointed by the Party instituting such proceedings. Within sixty days after the giving of such notice

the respondent Party shall notify the Party instituting proceedings of the name of the arbitrator appointed by the respondent Party.

3. If, within the time limits provided for in paragraph 1(b), paragraph 1(c) and paragraph 2 of this Annex, the required appointment has not been made or the required approval has not been given, either Party may request the President of the International Court of Justice to make the necessary appointment. If the President is a citizen or permanent resident of either Party or is otherwise unable to act, the Vice-President shall be invited to make the appointment. If the Vice-President is a citizen or permanent resident of either Party or is unable to act, the Member of the International Court of Justice next in seniority who is not a citizen or permanent resident of either Party shall be invited to make the appointment.

4. In case any arbitrator appointed as provided for in this Annex shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

5. The Arbitral Tribunal shall convene at such time and place as shall be fixed by the Chairman of the Tribunal. Thereafter, the Arbitral Tribunal shall determine where and when it shall sit.

6. The Arbitral Tribunal shall decide all questions relating to its competence and shall, subject to any agreement between the Parties, determine its own procedure.

7. Before the Arbitral Tribunal makes a decision, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, the international agreements both Parties have concluded and the generally recognised principles of international law.

8. Each Party shall bear the costs of its appointed arbitrator. The costs of the Chairman of the Tribunal and other expenses associated with the conduct of the arbitration shall be borne in equal parts by both Parties. The Arbitral Tribunal may

decide, however, that a higher proportion of costs shall be borne by one of the Parties.

9. The Arbitral Tribunal shall afford to the Parties a fair hearing. It may render an award on the default of a Party. Any award shall be rendered in writing and shall state its legal basis. A signed counterpart of the award shall be transmitted to each Party.

10. An award shall be final and binding on the Parties.

ANNEX B

1. The Arbitral Tribunal referred to in paragraph 2(c) of Article 13 shall consist of 3 persons appointed as follows:

(a) each party to the dispute shall appoint one arbitrator;

(b) the arbitrators appointed by the parties to the dispute shall, within thirty days of the appointment of the second of them, by agreement, select an arbitrator as Chairman of the Tribunal who shall be a citizen or permanent resident of a third country which has diplomatic relations with both Parties.

2. Arbitration proceedings shall be instituted by written notice setting forth the grounds of the claim, the nature of the relief sought and the name of the arbitrator appointed by the party instituting such proceedings.

3. If a party to the dispute, receiving notice in writing from the other party of the institution of arbitration proceedings and the appointment of an arbitrator, shall fail to appoint its arbitrator within thirty days of receiving notice from the other party, or if, within sixty days after a party has given notice in writing instituting the arbitration proceedings, agreement has not been reached on a Chairman of the Tribunal, either party to the dispute may request the Secretary-General of the International Centre for Settlement of Investment Disputes to make the necessary appointment.

4. In case any arbitrator appointed as provided in this Annex shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as

prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

5. The Arbitral Tribunal shall, subject to the provisions of any agreement between the parties to the dispute, determine its procedure by reference to the rules of procedure contained in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States.

6. The Arbitral Tribunal shall decide all questions relating to its competence.

7. Before the Arbitral Tribunal makes a decision it may at any stage of the proceedings propose to the parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, any agreement between the parties to the dispute and the relevant domestic law of the Party that admitted the investment.

8. An award shall be final and binding and shall be enforced in the territory of each Party in accordance with its law.

9. Each party to the dispute shall bear the costs of its appointed arbitrator. The costs of the Chairman of the Tribunal and other expenses associated with the conduct of the arbitration shall be borne equally by the parties. The Arbitral Tribunal may, however, decide that a higher proportion of the costs shall be borne by one of the parties.

APPENDIX X: Pakistan's Draft Model Bilateral Investment Treaties

Draft Model Bilateral Investment Treaty 2008 of Pakistan











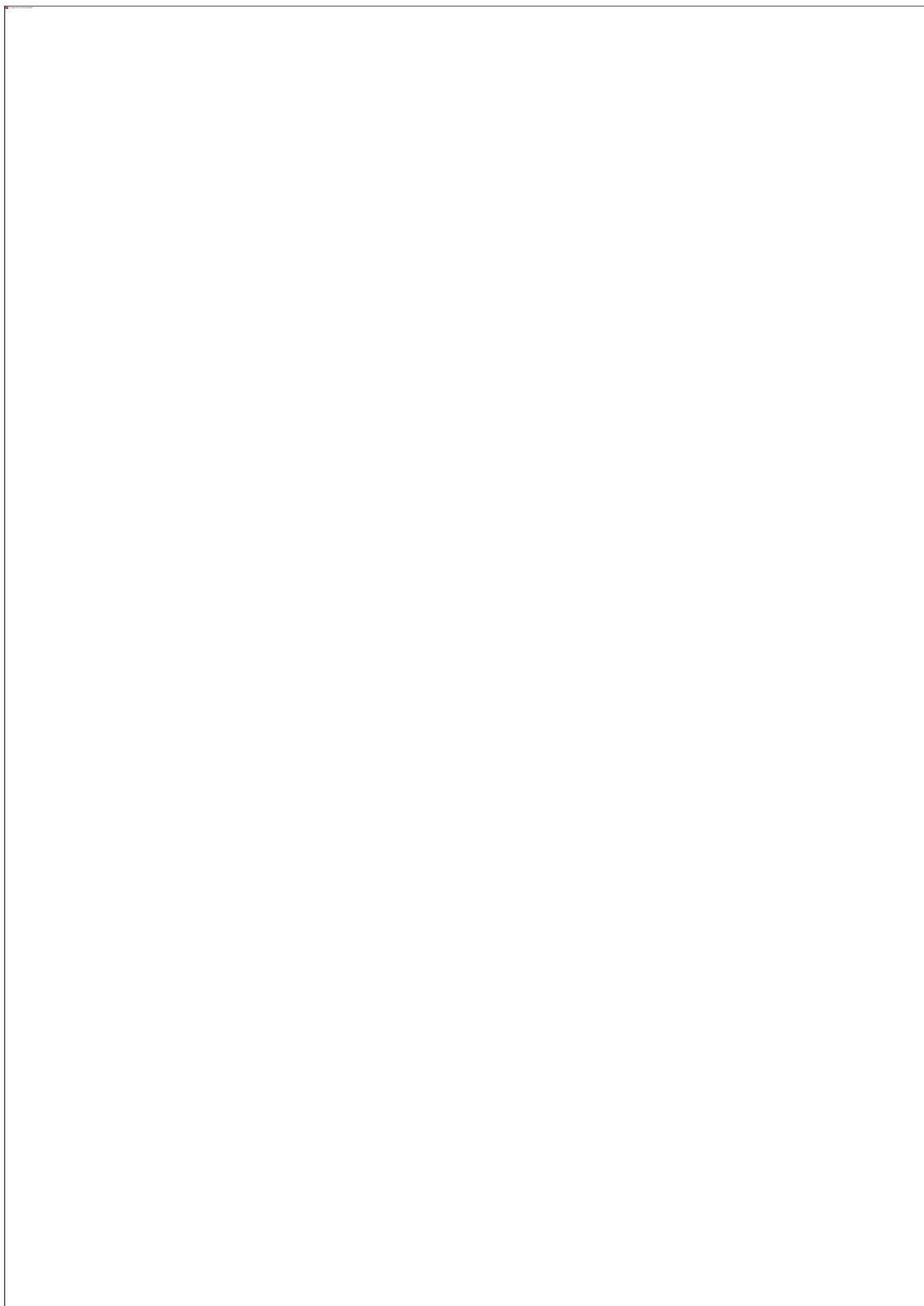




















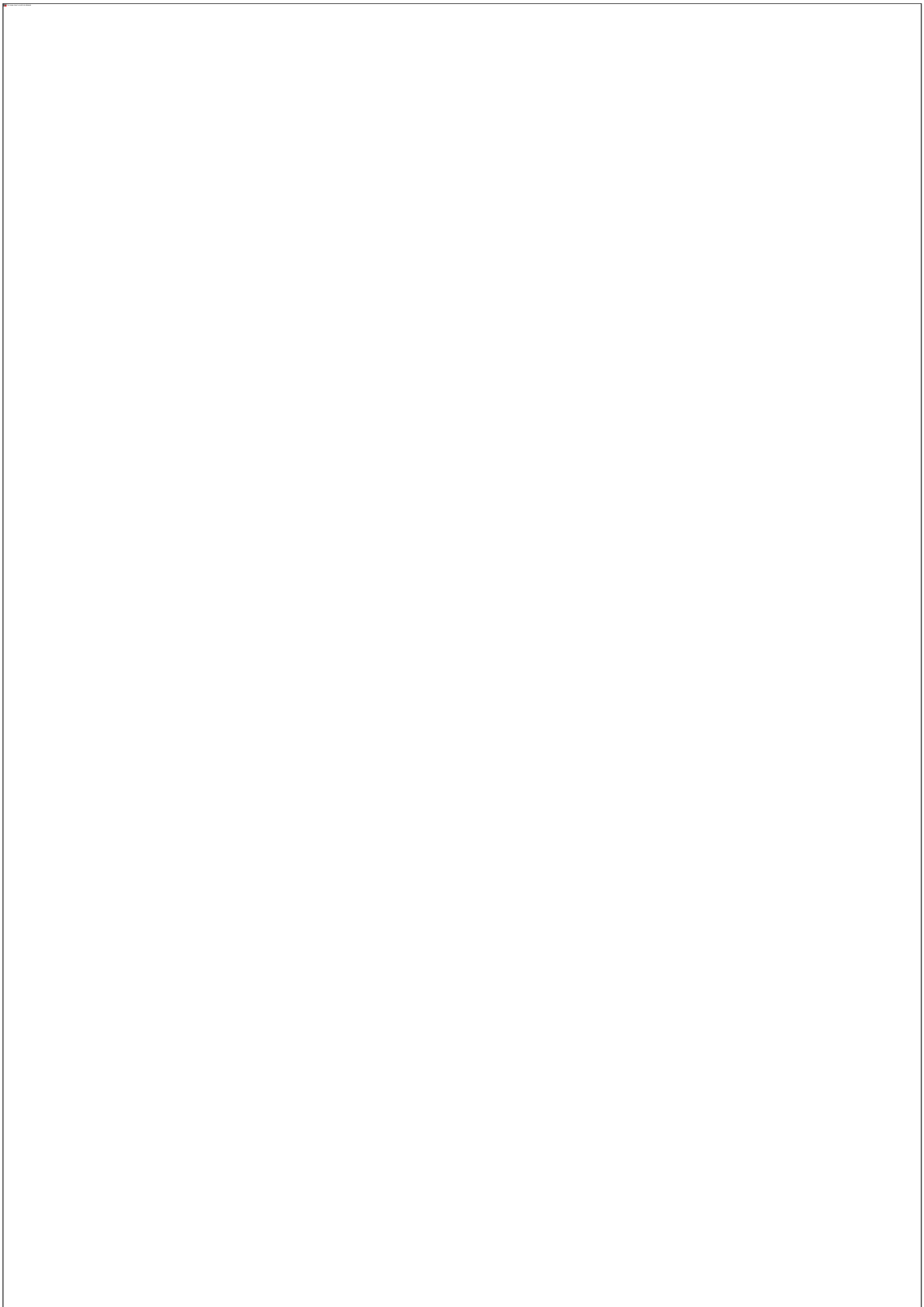


















APPENDIX 5: DISCUSSION ON POSSIBLE SOLUTIONS TO ADDRESS JUDICIAL ACTIVISM

Sack or remove the judges

The first possible solution for undesired judicial activism or judicial interference can be to sack or remove the sitting judges of the apex courts in the judicial hierarchy. However, whether it is achievable for the legislature or executive to sack or remove judges or not must be addressed.

Under the constitution of Pakistan, judges of the higher judiciary can only be removed by the Supreme Judicial Council (“SJC”). For removal of one or more judges, anyone can file a reference before the SJC who will conduct a hearing on such reference and give its verdict. In recent judicial history, the President of Pakistan has sent a reference against then Chief Justice of SCP Justice Iftikhar Chaudhry and sacked him until the decision of SJC. However, this attempt failed and the SJC could not hear the reference against the CJP. The larger bench of the SCP unanimously restored the CJP in its verdict in *Justice Iftikhar Muhammad Chaudhry v The President of Pakistan*.¹

Later, the President of Pakistan through the Proclamation of Emergency Order² (“PCO”) removed the judges of the higher judiciary who refused to take oath on president’s said PCO. He appointed new judges in SCP and HCs, including the CJP. On this occasion, once again lawyers, civil society, media and almost all major political parties launched a nationwide protest movement for restoration of the judiciary. The movement achieved its goal when the sacked judges were restored through an executive order issued by the Prime Minister of Pakistan. After restoration of the judiciary, the SCP in one stroke dismissed³

all those judges, some 110, of the High Courts and the SCP who had sworn on the PCO and reinstated those judges who refused to take oath on the PCO.

Additionally, the SCP held that imposition of emergency and proclamation of PCO by keeping the constitution in abeyance was unconstitutional illegal, mala fide and void ab initio. Resultantly, whatever had been done extra-constitutionally was struck down and the SCP declared the President Musharaf usurper. Therefore, the SCP directed the federal government to commence proceedings for committing high treason against the President of Pakistan and Army Chief as he then was. In compliance with the direction of the SCP, the federal government has already commenced proceedings under Art 6 of the High Treason (Punishment) Act 1973 against the former Army Chief and President of Pakistan. Failure of both attempts to sack and remove the judges by filing reference in SJC, holding the constitution in abeyance by issuing PCO and thereafter, restoration of the judiciary on both occasions, with as aftermath the removal of those judges who swore on the PCO, and for first time in Pakistan's history, proceeding for committing high treason against a former president clearly demonstrate that this first option is unlikely to work in the prevailing circumstances of Pakistan. Therefore, this option is here ignored for the reasons discussed.

7.6.2 Curtailing the powers of the Supreme Court of Pakistan

The second remedy to address the problem of judicial interference might be curtailing the powers of the SCP⁴ by amending the constitution. Before adopting this option, it would be important to examine the ability of parliament to amend the constitution in a manner to curtail the powers of the SCP.

In Pakistan, the legislature, executives and adjudicators derive their powers from the Constitution of Pakistan 1973 which describes their roles based on the 'trichotomy of powers'. The present constitution is in written form and is the supreme law of the country. There are two theories to address the question of whether parliament can amend the constitution as per its desires or not, namely Supremacy of the Parliament and Supremacy of the Constitution.

Supremacy of the parliament bestows upon the parliament the highest status⁵ within the hierarchy of the legal authorities of the State. Following Dicey's view,⁶ the supremacy of the parliament stands for nothing less than that: it has authority to enact or reject any law notwithstanding whatever it is. Neither any individual nor any institution has authority to overturn or question the legality or validity of an Act of the parliament. Consequently, under the theory of parliamentary sovereignty, parliament has vast and comprehensive authority of law-making, and overturning or rejecting any law, and this authority is an exclusive feature of parliament. Furthermore, said authority is unquestionable and no individual or institution can hamper this authority in any manner whatsoever; thus, parliament is immune in relation to Acts made by it.

The notion clearly demonstrates that Acts of parliament are not open for judicial review or scrutiny⁷. It was held by the UK House of Lords that, on an Act of parliament the maximum authority which the court enjoys is limited to looking into the role of the parliament while it was legislating. In the event, the court found that the Act had been passed by both Houses of Parliament and received Royal Assent, thus the Court of Justice does not have any right to inquire about the mode in which the bill was introduced in the parliament or proceedings prior to or during the course of debate there.⁸ Hence, under supremacy of the parliament theory, parliament enjoys vast, unquestionable, unchallengeable and immune authority to legislate. Given that the Act of parliament is not open for judicial review, the parliament can curtail and make rule in relation to any institution, including the judiciary. It can be argued that parliament is supreme and being representative of the people of the country can pass any law. Moreover, parliament is creator of the constitution; hence, enjoys the highest authority over the constitution and

can pass any amendment in the constitution. However, the sovereignty of the parliament is said to be a distinctive characteristic of the unwritten constitution, like that of the United Kingdom.⁹

On the other hand, the supremacy of the constitution is entirely in contrast to the supremacy of the parliament. The essence of this theory is that, in the legal chain of command, the constitution stands at the top of all institutions and sources of law. The role, power and limitations of all the organs of the State are predetermined and subject to some restrictions and limitations.¹⁰ According to Tanchev, the constitution is the major controller of fundamental public relations; its rules are made with consensus under constituent authority; hence, it holds broad character. The constitution dominates all persons living within the territory of the State, both original or legal persons. The supremacy of the constitution is also evident from the fact that all the laws and bye-laws are based on and reflect the constitutional values and norms. It can be said that parliament is itself a creature of the constitution, its powers are bestowed upon it by the constitution; hence, power to amend the constitution would be subject to certain limits. This means that, no law or bye-law can be enacted against the constitutional norms and values; also, persons whose acts are required to be under the constitution cannot amend the basic features of the constitution. In this situation, following the rules of separation of power, the superior judiciary of the State can step in to determine what the basic features of the constitution are and what the limitations are over the legislature.

The USA is governed under a written constitution where an Act of congress if conflicting with the constitution can be called into question by the judiciary following *Marbury v Madison*. President Lincoln once shared his concerns on the judiciary's role to review Acts of the parliament: he said,¹¹ people will lose their right 'to be their own ruler' if government's policies are fixed by the Supreme Court directly through its decisions in

the course of normal litigation. Likewise, President Jefferson warned that, ‘Opinion which gives the judges the right to decide [the meaning of the Constitution for the Legislative and Executive branches of government] would make the judiciary a despotic branch.’¹²

Without going into further depth in both theories, the position of the Pakistani parliament and judiciary are examined below to determine the fate of the first possible recommendation mentioned above. There has been a long debate in Pakistan about whether the Pakistani parliament can amend the constitution as it desires and wishes or not, and whether there are any limitations on parliament regarding constitutional amendments.

The Constitution of Pakistan Part XI Arts 338 and 339 deal with the amendment of the constitution and requires at least a two-thirds majority of both the houses¹³ of the parliament.

In the context of the amendment to the constitution, Art 339(4,5&6) is very important to resolve controversies over the authority and limitations¹⁴ of the parliament to amend the constitution. Art 339(5) categorically restricts all the courts from calling into question any amendment on any ground whatsoever. Similarly, subclause 6 further clarifies the situation by stating that the power of parliament to amend the constitution is without any sort of limitation and it can amend any provision of the constitution. Provisions indicate that:

339(5). No amendment of the Constitution shall be called in question in any court on any ground whatsoever.

(6). For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution.

Parliament's autonomy to amend any provision of the constitution and restriction upon the courts to call such amendment into question are very clear and unambiguous in the aforementioned clauses. Phraseology of these provisions is very simple: no word or phrase requires interpretation other than literal interpretation. Provision of subclause 6 is clear enough and shows the will of the creators of the constitution to confer powers upon the parliamentarians to amend any provision of the constitution. Had they wanted to exclude or impose any limitations on amendment of any provision of the constitution they would have categorically mentioned it, as is seen in Art 339(4). Literal construction of the Art 339(4) unambiguously demonstrates that, parliament can amend any provision of the constitution except provided in sub clause Art 339(4). This does not exclude authority to amend the provisions related to the powers of the superior judiciary or fundamental rights of the citizens or anything else, whatsoever. Subclause 4 imposes a limitation on parliament's right to amend the constitution in relation to the alteration of the boundaries of any province. The provision entails forwarding such amendment to the concerned provincial assembly for approval with at least two thirds majority prior to sending for presidential assent: 'A Bill to amend the Constitution which would have the effect of altering the limits of a Province shall not be presented to the President for assent unless it has been passed by the Provincial Assembly of that Province by the votes of not less than two-thirds of its total membership.']

Supremacy of the parliament or the constitution remained a long-standing controversy before the apex courts of Pakistan. The verdict of the SCP in *Zia ur Rehman*¹⁵ is an important judgment which provides the basic principle and standpoint of the SCP since the early days of the constitution. The court held that, in States having a written constitution, functions of the organs of the State are distributed and their powers are predetermined in the constitution. The court is a creature of the constitution, neither can it claim to be superior to the constitution nor can it strike down any constitutional

provision. The constitution is based on the trichotomy of power and the courts derive their powers from the constitution, therefore it will remain within the limits prescribed by the constitution.¹⁶ The dictum is also relied on by the Lahore High Court (“LHC”)¹⁷ which held that, it is settled principle of the law that courts have conferred upon them the jurisdiction to interpret the law, but they do not have jurisdiction to assume the role of the policy maker. On the question of ousting the jurisdiction of the SCP, the court concluded in *Saeed Ahmed Khan* case¹⁸ that, it cannot strike down the constitutional amendment merely on the ground that the same is promulgated to oust the jurisdiction of the court¹⁹ unless such amendment is mala fide, there is malice in fact or malice in law, excess or lack of jurisdiction and coram non iudice.²⁰ The court is only empowered to interpret such provision and identify its scope and nature in accordance with the established standards of interpretation. Court dismissed the petition with said observation. However, by pointing and interpreting aforementioned phrases the instant judgment laid the foundation for the SCP to re-examine this position in the future on the touchstone of these facts. The SCP once again reaffirmed its position to revisit the constitutional amendment in *Brig. (R) F.B. Ali*²¹ stating that, the SCP cannot invalidate a law on some sort of ethical contention or on a theoretical idea of law.

On the issue of judicial review and striking down the constitutional amendment, the standpoint of the apex courts in Pakistan remained fairly constant for decades. The court

once again acknowledged its position in *Wali Khan*²² and held that, the courts are not empowered to hold the constitutional amendment void or repugnant unless the constitution has been amended in sheer violation of the procedure prescribed in the constitution. In *Wali Khan*, the SCP for first time considered the judgment of the Indian Supreme Court (“ISC”) on basic structure theory²³ and rejected the same. In *Kesavananda Bharati case* the ISC held that constitutional provisions can be amended by the legislature save the basic structure and foundation of the constitutional remains unchanged which may consist, supremacy of the constitution, republican or democratic form of the government, secular and federal character of the constitution, separation of power between parliament, executive and the judiciary.²⁴

The basic structure theory considered and upheld in *Kesavananda Bharati case* emphasises that every constitution has its salient features and basic structure which may vary from constitution to constitution such as parliamentary form of the government, independence of judiciary. The role, authority and limits of all the organs of the State are predefined in the constitution. Therefore, court can strike down any constitutional amendment or legislation which is contradictory and conflicting with such basic structure of the constitution. In *Dewan Textile Mills*²⁵ the Karachi High Court (“KHC”) also pursued the line of the SCP. The KHC did not incline towards the challenge to the fourth amendment in the constitution on the ground of it being contrary to the basic structure theory. In *Niaz A. Khan*²⁶ KHC once again aligned its position with the precedents set by the SCP by rejecting the challenge to the seventh constitutional amendment.

The matter of constitutional amendment was again entertained by the SCP in *Federation of Pakistan v United Sugar Mills*²⁷. On the issue of the Fourth Amendment Act 1976 in the constitution, the court once again reiterated the dictum of *Zia ur Rahman* and held that, the court lacks jurisdiction and cannot review the constitutional provisions if it is adopted by the parliament following constitutional procedure. The court does not have authority to revisit the constitutional ‘instruments, amendments on the ground of competency or formal defect’²⁸. There are two significant aspects of the instant judgment: first, the SCP once again considered the judgment of the ISC, namely *Kesavananda Bharati*,²⁹ where it had rejected the amendment in the Indian constitution on the basic structure of constitution theory. The second aspect of the case was, it directly related to the curtailment of the powers of the courts by means of the fourth amendment in the constitution. The court upheld the verdict in *Zia ur Rahman* and rejected both arguments³⁰, curtailing the powers of the courts and the Indian precedent on basic structure theory. It can be observed that almost every time parliament passed a constitutional amendment it was challenged before the apex courts of Pakistan. Like the KHC, the Peshawar High Court (“PHC”) also had to adjudicate the matter of constitutional amendment in *Jehangir Iqbal Khan*.³¹ Following the same long-standing view of the apex courts, the PHC rejected the challenge to the Fifth Amendment in the constitution.

*Fauji Foundation*³² is one of the most significant cases on the controversy of constitutional and parliamentary supremacy. On the question of limitations on the authority of the parliament to amend the constitution, the SCP considered the dictum laid down by the ISC in several cases. The SCP once again reaffirmed the position taken in *Zia ur Rahman* and *United Sugar Mill*. Moreover, the SCP overruled *Darwesh M. Arbey*³³, where on the issue of the seventh amendment in the constitution, the learned judge at LHC held that, Parliament is not sovereign to amend the constitution according to its wishes and can desire ‘much less than the basic structure of the constitution’. While overruling *Darwaish Arbey*, the court held that, the ‘... amending power, unless it is restricted, can amend, vary, modify or repeal any provision of the constitution.’³⁴

A deviation from the orthodox approach of the higher judicial hierarchy has been seen to be emerging slightly when courts started considering the construction of phrases discussed in *Saeed Ahmad*. Interpreting Art 370(A) on affirmation of presidential orders, the court observed³⁵ that, an ouster clause³⁶ does not preclude the jurisdiction of the court where action under question is affected by the aforementioned phrases. Moving one step ahead of Saeed Ahmad case, the court determined that to invoke its jurisdiction to decide the constitutionality of such amendments it is not necessary to distinguish ‘malice in law’ and ‘malice in fact’. The same notion was once again followed by the SCP on the issue of ousting the jurisdiction³⁷ of the courts on proclamation of emergency by the

President under Art 334 of the constitution. It was affirmed again in *Pir Sabir Shah*³⁸, that despite the restriction on the court's jurisdiction contained in said ouster clause, the court has jurisdiction to review the proclamation order and declare it unconstitutional if it falls within the definition of 'without jurisdiction', 'mala fide' and 'coram non judice'.

Until now, it has been observed that, earlier courts had a firm view that the constitution is based on the trichotomy of power theory and legislation is the prerogative of the parliament. Courts cannot invalidate a constitutional amendment on any ground whatsoever save for not adopting the procedure prescribed in the constitution. However, at a later stage, the court slightly deviated from its firm view and asserted to have jurisdiction despite the ouster clause.

Another important judgment of the KHC regarding the abovementioned controversy is *Mujeeb Pirzada*.³⁹ The judgment in this case was upheld by the SCP by virtue of short order in *Mahmood Khan Achakzai*. In this case, the eighth amendment in the constitution was under question; the court held that, following the clear position of the superior courts in many previous decades, the SCP cannot annul the constitutional amendment for the reasons that it conflicts with 'Objective resolution, National aspirations' or with legal philosophical notions of basic structure.⁴⁰ The court further reiterated that unless an amendment is adopted in procedural violation of the constitution, the court cannot review the constitutional amendment on the basis of basic structure theory. *Mahmood Khan Achakzai*⁴¹ is one of the significant cases wherein constitutionality of the eighth amendment in the constitution was under question before the SCP. Nonetheless, challenge to eighth amendment failed, but then the CJ⁴² identified some basic features of

the constitution which sowed the seed of judicial activism and supremacy of the constitution in Pakistan. Taking into account the appended preamble, the Objective Resolution contained in Art 2A of the constitution, the SCP identified some salient features of the constitution, ‘federalism and parliamentary form of government blended with Islamic provisions’.⁴³ He added that insertion of the Objective resolution demonstrates the will of the legislature to have some salient features of the constitution. On the question of judicial review of parliament’s right to amend the constitution he added that, ‘there is a basic structure of the constitution which may not be amended by the parliament.’ However, ‘it could not answer with the touch of finality.’

Justice Raja Afrasiab and Justice Saleem Akhtar authored their separate judgment and followed the *Zia ur Rahman* position holding that, the constitution has predetermined the roles of all the organs of the State. It is not the duty of the adjudicator to call into question the wisdom of the legislature on any ground whatsoever including violation of basic structure unless the amendment is adopted in violation of the procedure prescribed in the constitution. Despite identifying some salient feature/basic structure of the constitution the SCP dismissed the petition and held that it does not have jurisdiction to annul the constitutional amendments.

In *Wukla Mahaz*⁴⁴ (*Lawyers’ Forum*), the challenge to fourteenth amendment in the constitution failed and the court rejected the contention that the amendment is in violation of the basic structure of the constitution.⁴⁵ Acknowledging the previous stand that there are basic features of the constitution, the court held that, the instant case does not raise the question of basic structure.

Pakistan's firm position on supremacy of the parliament remained consistent for decades; however, on every occasion the SCP seems to be moving slightly from its long-standing position. In *Zafar Ali Shah*,⁴⁶ the SCP allowed the Army Chief/ Chief Executive⁴⁷ of the country to amend the constitution to run the affairs of the government, but the court restrained him from making any sort of amendment in the basic feature of the constitution.

Just before the emergence of judicial activism in 2006 and prior to his removal in 2007, the then CJ Iftikhar Ahmad Chahdury dealt with the issue of supremacy of the parliament or supremacy of the constitution, called basic structure theory in *Pakistan Lawyers' Forum*.⁴⁸ This time the seventeenth amendment in the constitution was under challenge on the ground of being contrary and conflicting with the basic structure. The five-member bench of the SCP re-examined the whole controversy and aligned with the previous precedents stating that, though the constitution does have certain salient features, the SCP lacks jurisdiction to annul constitutional provisions and amendments on substantive grounds. The court further added that, there may be some restrictions on the parliament with regard to amending the basic structure,⁴⁹ but this issue is not open for judicial review; instead, is political in nature. Validity of constitutional amendment is to be judged by the people through standard parliamentary democratic process and fair general election and not by the courts.⁵⁰ The SCP held that there is no justified reason to adopt Indian precedents on basic structure as a doctrine discussed above.

The judgment is vital and significant in the sense that one of its authors, CJ Iftikhar Chaudhry, is deemed to be a flag-bearer and symbol of judicial activism in Pakistan.

Controversy over the supremacy of the parliament and constitution reached its peak when several petitions were filed in the SCP under its original jurisdiction challenging the eighteenth amendment in the constitution.⁵¹ It is pertinent to mention here that said amendment was unanimously passed by the parliament after the exercise of several years and several and long parliamentary meetings. Among several other provisions, Art 175A regarding appointment of the judges was said to be violative of the basic structure of the constitution as independence of the judiciary is one of the salient features of the constitution. The SCP headed by CJ Iftikhar Chaudhry, one of the authors of the *Lawyers Forum* case observed⁵² that, the SCP has time and again acknowledged the salient features of the constitution. The SCP would refrain from giving its final verdict on the merits of the case at this stage, rather it would prefer to defer the matter for reconsideration of the parliament in accordance with the direction of the SCP. The SCP decided to take up the matter for final verdict at a later stage to insure the compliance of its recommendation to amend Art 175A of the constitution following the court's term in light of the concerns/ reservations expressed and observations/ suggestions.⁵³ Most significantly, the court observed it is creature of the constitution which is based on the trichotomy of powers, and functions of all the organs of the State are pre-determined. Although the people being politically sovereign, trust of the sacred constitution had not made the judges ultimate authority, however:

But they wanted the Judges to do right to all manner of people according to law, without fear or favour, affection or ill-will... Judicial independence is one of the core values of our Constitution because it is inextricably linked with the

enforcement of fundamental rights (Article 184 (3) and Article 199 of the Constitution) and the rule of law.⁵⁴

The court emphasized the independence of the judiciary as one of the salient features of the constitution, hence appointment of the judges should be in line with the ideas of independence of the judiciary and trichotomy of power. The SCP instead of disposing of the petitions adjourned the proceedings and referred the matter to parliament for reconsideration in the light of observations of the SCP which was largely welcomed by the Pakistani media.⁵⁵ On receiving the reference from the SCP, parliament followed the direction of the SCP in its entirety and passed the nineteenth amendment adopting all the recommendations and observations of the SCP. By doing so, the parliament accepted the CJ and SCP's decisive role in the appointment of the judges in the higher judiciary. The way parliament acted in compliance of said reference clearly demonstrates that parliament was not unmindful of the fact that the SCP did not leave its recommendations to the wisdom of the parliament. It merely adjourned the proceedings and kept the right of final decision in its hand on parliament's failure to comply with the order in its entirety. Construction of observations made in paragraphs 8 to 10 discussed above regarding amendment of the Art 175 of the constitution in accordance with concerns/ reservations expressed and observations/ suggestions clearly indicate the SCP's intention to deviate from its long-standing position on constitutional amendments. Moreover, in the same case the SCP examined the famous Indian cases on the topic and rejected the basic structure of the constitution as a doctrine.

However, the SCP by means of its observation made in paragraphs 8 to 10 already discussed above conveyed its message to parliament that it would not be reluctant to overrule constitutional amendments and may follow the several times rejected basic structure theory. This reveals that if in the future the SCP feels uncomfortable on any constitutional amendment it is very likely to strike down the same being contrary and violative to the basic structure of the constitution theory. Therefore, it will be correct to

suggest that it is very unlikely for parliament to curtail the powers of the SCP by means of constitutional amendment. In the light of the outcome of the eighteenth amendment case, any Act of parliament or constitutional amendment will be subject to judicial review and any attempt to curtail the powers of the SCP is unlikely to be sustained.